

LANDLORD—TENANT—THE FALL OF LANDLORD TORT IMMUNITY—*Sargent v. Ross*, 308 A.2d 528 (1973).

I. INTRODUCTION

A landlord is generally not liable<sup>1</sup> for injuries incurred as a result of unreasonably dangerous conditions existing on property which he has leased to another.<sup>2</sup> However, the Supreme Court of New Hampshire, in *Sargent v. Ross*,<sup>3</sup> placed that state in direct conflict with the vast weight of American authority<sup>4</sup> by rejecting this doctrine of landlord tort immunity.

In *Sargent*, plaintiff's four-year old daughter died as a result of a fall from an outdoor stairway while being cared for at her regular baby-sitter's apartment. Plaintiff's damage suit was brought against the baby-sitter (tenant) for negligent supervision, and against the landlord for negligent construction and maintenance of the stairway. The evidence indicated that the stairway was dangerously steep and that the railing was insufficient to prevent the fall. The primary issue in the case was, therefore, whether the landlord was immune from liability or whether the facts of the case constituted one of the exceptions to the rule of landlord tort immunity.<sup>5</sup> The landlord's defense of immunity was based on the fact that the stairway serviced only the tenant's apartment and therefore was not a passageway used in common with other tenants. This being the case, there was no implication that the landlord retained control over the stairway, and thus no reason why the doctrine of landlord immunity should not attach.<sup>6</sup>

The court rejected the landlord's argument. Admitting that it "could strain [the] test to the limits and find control in the landlord,"<sup>7</sup> but not being "inclined to so expand the fiction,"<sup>8</sup> the court chose instead to abrogate the doctrine of landlord tort immunity. The rejection of the doctrine was unequivocal: "We think that now is the time for the landlord's limited tort immunity to be relegated to the history books where it more properly belongs."<sup>9</sup>

The repudiation of landlord tort immunity necessitates the promulgation of a new standard with which the conduct of a landlord should be judged. The *Sargent* court, in choosing an alternative standard of care, decided there was

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<sup>1</sup> There are several exceptions to this doctrine of tort immunity whereby the landlord will be subject to tort liability. The landlord is liable if: (1) there are undisclosed or hidden dangers known only to the landlord, (2) the land is leased for public use, (3) the particular area was a common area of which the landlord maintained control, (4) the landlord has made the land dangerous through negligent repairs, 2 F. HARPER & F. JAMES, *THE LAW OF TORTS*, §§ 27.16, 27.17 (1956); W. PROSSER, *TORTS* § 63 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS*, §§ 358-62 (1965). About half the state courts have also held that liability exists when a landlord fails to perform in accordance with an express agreement to repair. W. PROSSER, *TORTS* § 63, at 408-10 (4th ed. 1971).

<sup>2</sup> 2 R. POWELL, *REAL PROPERTY* § 234 (rev. ed. 1973); W. PROSSER, *TORTS* § 63 (4th ed. 1971); *RESTATEMENT (SECOND) OF TORTS* §§ 358-62 (1965).

<sup>3</sup> 308 A.2d 528 (1973).

<sup>4</sup> See authorities cited in note 2 *supra*.

<sup>5</sup> 308 A.2d at 530.

<sup>6</sup> 2 R. POWELL, *REAL PROPERTY* § 234 (rev. ed. 1973); W. PROSSER, *TORTS* § 63 (4th ed. 1971); Annot., 25 A.L.R.2d 364, 366 (1952).

<sup>7</sup> 308 A.2d at 532.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 533.

no longer any justification for limiting landlord liability: "Henceforth, landlords as other persons must exercise reasonable care not to subject others to an unreasonable risk of harm."<sup>10</sup> The court thus put the landlord on an equal footing with all other persons by charging him with the standard of care required by the general law of negligence.

Moreover, although *Sargent* involved the liability of a landlord to a third party, there appears to be no distinction between the duty owed to tenants vis-a-vis the duty owed to third parties. The landlord's new duty is to exercise reasonable care to reduce the likelihood of personal injuries, whether incurred by a tenant or a third party, from defects on property.<sup>11</sup>

This case note examines the considerations which were responsible for the abrogation of the doctrine of landlord tort immunity. The tort rationale explicitly set forth in *Sargent v. Ross* entirely justifies the rejection of the immunity, but there are also independent considerations, not completely delineated by the Supreme Court of New Hampshire, which strongly support the *Sargent* holding. Therefore, the discussion will first focus on the explicit arguments put forward by the court in *Sargent* and then analyze other underlying justifications for the decision. The scope of the discussion is limited, however, to the issues surrounding the liability of a landlord who leases residential units.<sup>12</sup>

## II. THE RATIONALE OF SARGENT

The *Sargent* court recognized that the general principles of tort law impose liability upon persons who have caused injuries by their failure to act reasonably under the circumstances,<sup>13</sup> and that the central issue in any tort case is whether or not the alleged tortfeasor has acted reasonably. However, in the case of a landlord, the only way to establish liability was to fit the facts into one of the exceptions to the rule of landlord tort immunity. Emphasis on the exceptions to the rule of landlord immunity diverted the jury's attention from the central issue whether the landlord had acted unreasonably.<sup>14</sup> Therefore, in order to charge the landlord with the standard of care of the general law of negligence, the court believed it was necessary to abolish the doctrine of landlord immunity.

The court postulated three main justifications for abolishing the immunity: (A) the concept of tort immunity is deteriorating; (B) the historical basis for the doctrine of landlord immunity is now irrelevant and obsolete; (C) the recognition of a warranty of habitability in a lease transaction discards the doctrine of *caveat emptor*.

### A. The Concept of Tort Immunity Is Deteriorating

*Sargent* is in accord with the general proposition that no one should be immune from the foreseeable consequences of his actions. Immunity is a dying

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<sup>10</sup> *Id.* at 534.

<sup>11</sup> *Id.* at 535.

<sup>12</sup> The purpose of confining the discussion to residential units is to exclude any consideration of commercial leases.

<sup>13</sup> 308 A.2d at 530.

<sup>14</sup> *Id.* at 533.

concept.<sup>15</sup> Charities, governments, parents and spouses have all seen their respective tort immunities substantially diminished in recent years. As one court has observed:

The law's emphasis ordinarily is on liability, not immunity, for wrongdoing. . . . The rule of immunity itself has given way gradually but steadily through widening, though not too well or consistently reasoned modifications. It is disintegrating. . . . As more and more steps are taken, correction becomes more complete. The process is nearing the end. This leaves the steps untaken standing out as the more anomalous.<sup>16</sup>

The *Sargent* court was quick to recognize the anomalous result which would have arisen from an application of the doctrine of landlord tort immunity. The tenants argued that it was unreasonable to impose upon them the duty of repairing a major structural defect.<sup>17</sup> The landlord, however, denied liability "because the stairs were not under her control."<sup>18</sup> Both tenant and landlord thus claimed the other party should be responsible, and the doctrine of landlord tort immunity supported both arguments. As a result, the plaintiff faced the dilemma of an intolerable rule which left "neither landlord nor tenant responsible for dangerous conditions on the premises."<sup>19</sup>

Since the plaintiff's claim arose from the construction of the stairway at a dangerously steep pitch,<sup>20</sup> a major alteration of the property was needed to alleviate the defect. Tenants generally possess neither the finances nor a sufficient long-term property interest to justify expenditures for substantial alterations. Relying on *Kline v. Burns*,<sup>21</sup> the *Sargent* court held that "ordinarily the landlord is best able to remedy dangerous conditions, particularly when a substantial alteration is required."<sup>22</sup> But the landlord is encouraged to remain idle by the doctrine of landlord tort immunity. Any attempt to repair might serve as evidence of his control,<sup>23</sup> while repairs actually made might only increase his exposure to liability if such repairs are negligently undertaken.<sup>24</sup> Therefore, if the tenant is under no duty to make substantial repairs, failure to impose liability on the landlord leaves the injured party with no remedy. The court indicated that the landlord's position in society should not be held so sacrosanct as to guarantee him freedom from liability. On the contrary, "[c]onsiderations of human safety within an urban community dictate that the landowner's relative immunity . . . be modified in favor of negligence principles of landowner liability."<sup>25</sup> In a legal system which seeks to compensate injured parties for the harm they have

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<sup>15</sup> See W. PROSSER, TORTS §§ 131-35 (4th ed. 1971).

<sup>16</sup> *President and Dir. of Georgetown College v. Hughes*, 130 F.2d 810, 827 (D.C. Cir. 1942).

<sup>17</sup> 308 A.2d at 532.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> 111 N.H. 87, 276 A.2d 248 (1971).

<sup>22</sup> 308 A.2d at 532.

<sup>23</sup> *Id.*

<sup>24</sup> RESTATEMENT (SECOND) OF TORTS § 362 (1965).

<sup>25</sup> 25 VAND. L. REV. 623, 640 (1972).

suffered, there is no place for a doctrine which would immunize landlords from liability. All tortfeasors must shoulder the responsibility for the foreseeable consequences of their actions.

B. *The Historical Basis for the Doctrine of Landlord Immunity Is Now Irrelevant and Obsolete*

The common law recognized the lease as a conveyance of an estate in land. As the holder of an estate, the tenant was entitled to the exclusive use and possession of the land. The landlord, having consigned the estate to the tenant, was devoid of any rights respecting the premises for the duration of the term of the lease. As a result of this conveyance, the landlord was entitled to rent. The primary object of the transaction was the land itself, for it was from the earth that the tenant would generally grow the crops which produced the income to pay the rent. It was "the fields, orchards, pastures and streams and their possession"<sup>26</sup> that concerned the parties. Since cultivation of the fields was generally the contemplation of the parties, buildings and other improvements were normally incidental to the agreement.<sup>27</sup>

Inherent in the tenant's right to the exclusive use and possession of the land was the landlord's lack of any right to re-enter. Absent a power of re-entry, the landlord was under no obligation to look after the leased premises.<sup>28</sup> Therefore, under the common law the general rule was that, absent an agreement to the contrary, a landlord was under no duty to repair. As the concept of tort liability began to develop, it was easy for the courts to formulate another general rule exempting landlords from liability for injuries caused by defective or dangerous conditions on the leased premises. A landlord who had no power to enter and repair certainly had no liability for the injurious results of unmade repairs. Such a responsibility could better be shouldered by the tenant in possession, who was charged with the upkeep of the premises. As a result, the common law courts developed the doctrine of landlord tort immunity. The reasoning of the courts was probably aided by the fact that most landlords were men of considerable wealth and "[t]he common law judges largely represented the land-owning class."<sup>29</sup>

The concept that a landlord should be immune from tort liability received authoritative support from the doctrine of *caveat emptor*. The application of this "sale of goods" concept to leases purported to put the tenant on notice that he took possession at his own risk. Therefore, the landlord was under no duty to deliver the premises in a safe condition because it was the responsibility of the tenant to determine for himself the condition of the property before entering into the lease agreement.<sup>30</sup> This rationale left the landlord devoid of any liability for dangerous conditions existing at the outset of the lease.<sup>31</sup>

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<sup>26</sup> Quinn and Phillips, *The Law Of Landlord Tenant: A Critical Evaluation Of The Past With Guidelines For The Future*, 38 FORDHAM L. REV. 225, 227 (1969).

<sup>27</sup> *Kline v. Burns*, 111 N.H. 87, 91, 276 A.2d 248, 250 (1971).

<sup>28</sup> W. PROSSER, TORTS § 63 at 400 (4th ed. 1971); 62 HARV. L. REV. 669 (1949).

<sup>29</sup> Harkrider, *Tort Liability Of A Landlord*, 26 MICH. L. REV. 260, 261 (1928).

<sup>30</sup> 62 HARV. L. REV. 669 (1949).

<sup>31</sup> W. PROSSER, TORTS § 63 at 400 (4th ed. 1971); RESTATEMENT (SECOND) OF TORTS § 356, Comment (a), (1965). Although the Restatement sets out the general rule of landlord immunity, there is no mention of *caveat emptor* as the origin of the rule.

because the tenant took "the premises as he [found] them, for better or for worse."<sup>32</sup> In the graphic terms of one English jurist, "there is no law against letting a tumbledown house."<sup>33</sup>

Thus the doctrine of landlord immunity, as originally developed, represented a total exemption from liability. The landlord was immune from liability for injuries resulting from lack of repairs made subsequent to the lease,<sup>34</sup> and liability for defects existing prior to the lease was imposed upon the tenant through the doctrine of *caveat emptor*.<sup>35</sup>

Contrary to appearance, this arrangement was not unusually burdensome to the tenant. He had bargained for the use of the land and that is exactly what he obtained. All other considerations were secondary to his right to till the fields:

It all made sense back in those days with the landlord off on the hunt or drinking port in the quiet of the evening, and the tenant asking only to be left alone to tend his fences and to shear his sheep. The heart of the system was land and its possession. The model landlord was the one who did the least. The tenant in turn was expected to run the farm, to be the omniscient man fully prepared to see to his own own shelter, heat and light.<sup>36</sup>

A tenant in a feudal, agrarian economy was not unduly prejudiced by the arrangement as he was considered "capable of maintaining the premises with little difficulty."<sup>37</sup> The buildings were easy to repair, being simply constructed and devoid of modern structural complexities. Moreover, the buildings were merely incidental to the core of the arrangement; what the parties had bargained for was the use of the land itself.

Although landlord tort immunity was the product of a rural agrarian economy, the social conditions which surrounded the creation of the immunity were not resistant to change. The momentous societal transformation of the industrial revolution fostered the decline of agrarianism and the rise of the urban, industrial economy. The law, however, was more resistant to change, and as a result a problem arose: the agrarian law of leases slowly became unsuitable to industrial man. "The social changes in England and the United States since the eighteenth century, taken altogether, have made the presumptions of agrarian landlord-tenant law singularly inappropriate."<sup>38</sup> Generally speaking, the modern tenant is no longer interested in large amounts of land. Working the land is no longer

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<sup>32</sup> Harkrider, *Tort Liability Of A Landlord*, 26 MICH. L. REV. 260, 262 (1928).

<sup>33</sup> *Robbins v. Jones*, 15 C.B.N.S.221, 240; 143 Eng. Rep. 768, 776 (1863).

<sup>34</sup> RESTATEMENT (SECOND) OF TORTS § 355 (1965).

<sup>35</sup> See 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.16 at 1510 (1956). Harper and James do not use the term *caveat emptor*, but instead talk of the tenant's assumption of risk. The doctrine that the tenant has assumed the risk that the premises are safe is the basic premise of *caveat emptor*. See also RESTATEMENT (SECOND) OF TORTS § 356 (1965).

<sup>36</sup> Quinn and Phillips, *The Law Of Landlord Tenant: A Critical Evaluation Of The Past With Guidelines For The Future*, 38 FORDHAM L. REV. 225, 231 (1969).

<sup>37</sup> 59 GEO. L.J. 1153, 1156 (1971).

<sup>38</sup> J. LEVI, P. HABLUTZEL, L. ROSENBERG & J. WHITE, *MODEL RESIDENTIAL LANDLORD-TENANT CODE* 6 (tent. draft 1969).

the source of income to pay the rent.<sup>39</sup> The modern tenant, earning his income in an industrial economy, is interested instead in adequate living conditions to house his family. "He [does] not share the farmer's interest in being left alone to work the fields. Indeed there [are] no fields."<sup>40</sup> His interest is focused on a building, often an apartment in a multi-dwelling unit, and the accompanying services necessary to provide him with a satisfactory share of shelter and comfort.<sup>41</sup> In short, the leaseholder of a residential unit no longer considers the land to be the primary object of the transaction. The rise of the industrial community has transformed the character of a residential lease.

Industrialization also made it increasingly unreasonable for tenants of residential units to make repairs. The size and complexity of modern residential buildings made the tenant incompetent, rather than "omniscient," to undertake repairs.<sup>42</sup> Industrialization increased population mobility, resulting in an increasing number of short-term residential leases. The short duration of these leases would often present a further obstacle to the tenants' ability to repair; they might find it impossible "to obtain any financing for major repairs since they have no long-term interest in the property."<sup>43</sup>

Despite the changes brought about by industrialization, the tenants' common law duty to repair, as well as his liability for injuries resulting from defects in the property, remained intact. Gradually the courts began to have misgivings about the doctrine of landlord tort immunity as it became increasingly obvious that in some circumstances the landlord was probably better suited than the tenant to undertake repairs.<sup>44</sup> The courts recognized that the common law doctrine was in need of modification, and they began to construct limitations to the rule.

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<sup>39</sup> The Bureau of Labor Statistics estimated that in 1971 only 3.9 percent of the population could be classified as farm workers. 1973 WORLD ALMANAC AND BOOK OF FACTS 119.

<sup>40</sup> Quinn & Phillips, *The Law Of Landlord Tenant: A Critical Evaluation Of The Past With Guidelines For The Future*, 38 FORDHAM L. REV. 225, 231 (1969).

<sup>41</sup> *Id.* at 321:

The new type of tenant was anything but self-sufficient and the last thing he wanted was to be left alone. Since he occupied only a part of the building, he was dependent on the rest of it. He relied upon the building's water system, lighting system, and heating system; he was sharing walls, doors, corridors and stairways. Agrarian self-reliance in this context is simply not possible.

<sup>42</sup> It has come to be recognized that ordinarily the lessee does not have as much knowledge of the condition of the premises as the lessor. Building code requirements and violations are known or made known to the lessor, not the lessee. He is in a better position to know of latent defects, structural and otherwise, in a building which might go unnoticed by a lessee who rarely has sufficient knowledge or expertise to see or to discover them. A prospective lessee . . . cannot be expected to know if the plumbing or wiring systems are adequate or conform to local codes. Nor should he be expected to hire experts to advise him. Ordinarily all this information should be considered readily available to the lessor who in turn can inform the prospective lessee.

*Reste Realty Corp. v. Cooper*, 53 N.J. 444, 452, 251 A.2d 268, 272 (1969). The above passage is also quoted in *Lemle v. Breeden*, 51 Hawaii 426, 432-33, 462 P.2d 470, 474 (1969). *Accord*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1078 (D.C. Cir. 1970); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 364, 280 N.E. 2d 208, 216 (1972); *Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 251 (1971); *Foisy v. Wyman*, 515 P.2d 160, 164 (Wash. 1973).

<sup>43</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970).

<sup>44</sup> See sources cited in note 42 *supra*.

They usually did so, however, "by making exceptions to the general rules of non-liability rather than by adopting a fundamentally different theory as to duties of a [landlord]." <sup>45</sup> The law as it stands today is a complex jumble of exceptions. <sup>46</sup> This present state of the law—limited landlord tort immunity—is what the *Sargent* opinion found to be objectionable. Instead of increasing the confusion by establishing another exception, *Sargent* adopted a "fundamentally different theory" of the duty of a landlord by abolishing the doctrine of landlord tort immunity.

The cornerstone of the doctrine of landlord tort immunity was the fact that the lease agreement was actually a conveyance of property which transferred control over the land from landlord to tenant. *Sargent* recognized that the original justification for the doctrine has eroded with the disappearance of an agrarian society. The rule is an historical anachronism. When the social conditions supporting a rule of law undergo a substantial change, the dictates of justice demand that the rule as well be subjected to re-evaluation. The doctrine of landlord tort immunity is just as obsolete as the agrarian community whence it evolved.

### C. *The Recognition of a Warranty of Habitability in a Lease Transaction Discards the Doctrine of Caveat Emptor*

New Hampshire was among the vanguard of jurisdictions which recognized a warranty of habitability in a lease transaction. <sup>47</sup> A warranty of habitability consigns to the graveyard the theory of *caveat emptor* as that doctrine related to leases. If the landlord warrants the premises to be safe for human habitation, the landlord has also agreed to accept responsibility for the condition of the premises. That responsibility establishes the landlord's duty in tort to maintain the property in a reasonably safe condition. It is not the tenant who has accepted the risk but the landlord. As previously discussed, the doctrine of *caveat emptor* was one of the bases for the rule of landlord non-liability in tort. Therefore, the rejection of *caveat emptor* marks the discarding of "the very legal foundation and justification for the landlord's immunity in tort for injuries to the tenant or third persons." <sup>48</sup>

*Sargent* did not explicitly discuss the warranty of habitability other than to recognize the warranty as the basis for the rejection of *caveat emptor*. However, it is submitted that the existence of a warranty of habitability is the underlying rationale of the *Sargent* decision. The duties imposed on a landlord by a warranty of habitability dictate rejection of the rule of non-liability in tort. Jurisdictions which follow the *Sargent* lead may find the warranty of habitability the most useful weapon in the arsenal that can be aimed at the doctrine of landlord tort immunity.

### III. OTHER UNDERLYING CONSIDERATIONS IN SUPPORT OF SARGENT

The decision to charge the landlord with the traditional standard of care of the general law of negligence can be viewed as a logical extension of the

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<sup>45</sup> 62 HARV. L. REV. 669, 671 (1949).

<sup>46</sup> See note 1 *supra*.

<sup>47</sup> *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

<sup>48</sup> 308 A.2d at 534.

implied warranty of habitability. The full implications of this implied warranty were not fully discussed by the court in *Sargent*. This part of the case note, therefore, suggests some alternative justifications for the result reached in *Sargent*, which focus essentially on a warranty theory. The discussion will be predicated on the following propositions: (A) A residential lease gives rise to an implied warranty of habitability because such a lease more closely resembles a contractual agreement than a property transaction; a breach of that warranty should evoke remedies for personal injuries. (B) The legislative intent inherent in the housing codes gives rise to an implied warranty of habitability; a breach of that warranty should also evoke remedies for personal injuries. (C) The existing housing codes offer inadequate protection to injured persons; in the absence of an implied warranty of habitability, most jurisdictions have found no statutory duty arising from the housing codes which will impose liability upon landlords for personal injuries.

A. *The Contractual Nature of a Residential Lease Creates a Warranty of Habitability*

The doctrine of landlord tort immunity has its antecedents in real property law.<sup>49</sup> The decision to abolish the doctrine of the immunity may have been reached earlier were it not for the courts' conceptualization of the lease as basically a property transaction. The medieval view of a lease as a conveyance of an estate in land is simply inadequate to meet the needs of residential tenants who are dependent upon landlords for a large package of services.<sup>50</sup> Modern residential leases should be recognized as primarily involving the purchase of shelter together with a variety of services incident to that shelter. Recognition of the lease as primarily a contractual agreement<sup>51</sup> for the purchase of shelter for a specified period of time should offer the tenant all the protections of the general law of contracts, particularly protections analogous to the provisions of the Uniform Commercial Code relating to the sale of goods.<sup>52</sup> Among the protections afforded by the Uniform Commercial Code are implied warranties of merchantability and fitness.<sup>53</sup> Regarding the landlord as a seller of shelter presumes an implied warranty on the part of the landlord that the premises are fit for the intended purpose.<sup>54</sup> If the premises are unfit, the landlord should

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<sup>49</sup> See text beginning at note 26 *supra*.

<sup>50</sup> Quinn & Phillips, *The Law Of Landlord Tenant: A Critical Evaluation Of The Past With Guidelines For The Future*, 38 FORDHAM L. REV. 225, 231 (1969).

<sup>51</sup> The civil law regards the lease as a contract. See 2 M. PLANIOL, TREATISE ON THE CIVIL LAW, No. 1663 (1959).

<sup>52</sup> It is not contended that the law of landlord-tenant be purged of all real property doctrines. A lease represents a unique combination of both contract and property law, and should be viewed as both a conveyance and contract. It is contended, however, that a residential tenant is entitled to the same protections offered to a vendee under the law of sales. The implied warranties which are incident to a sales transaction were conceived to prevent unfair bargaining. The vendor was often in a better position than the vendee to know the condition and quality of the goods and to distribute the losses which might occur from defects in the goods. 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 28.19 (1956). When the same conditions exist between landlord and tenant, the same protections should be afforded.

<sup>53</sup> UNIFORM COMMERCIAL CODE §§ 2-314, 2-315 [hereinafter cited as U.C.C.].

<sup>54</sup> Some courts have applied a warranty of habitability to a residential lease. See text beginning at note 61 *infra*.



then be liable for all damages resulting from the breach of the implied warranty of fitness. Moreover, the Uniform Commercial Code provides a remedy for personal injuries which result from a breach of warranty.<sup>55</sup> If a lease transaction is viewed as analogous to a sale of goods, a remedy should also be available for personal injuries which result from a landlord's breach of the implied warranty of habitability.

One of the basic tenets of modern contract law is that "the buyer of goods and services in an industrialized society must rely upon the skill and honesty of the supplier to assure that goods and services purchased are of adequate quality."<sup>56</sup> This reliance on the part of the buyer is the source of a warranty on the part of the seller that the goods are fit and merchantable.<sup>57</sup> Residential tenants are often forced to rely on the skill and honesty of their landlords to assure that the premises are of sufficient quality. In fact their reliance may be even greater than that involved in the sale of goods. The inequality of bargaining power between landlords and tenants, the tenants' lack of leverage to demand better housing, racial and class discrimination, the standardized lease form, and, the shortage of adequate urban housing all combine to increase the urban tenants' dependence on their landlords.<sup>58</sup>

Although the doctrine of implied warranty originated in the law of sales, warranty protection should not be denied in analogous situations when the same considerations arise.<sup>59</sup> In transactions for the lease of goods in which the consumer has been forced to rely on the skill and honesty of the supplier to the same extent as would a purchaser of goods, courts have been willing to imply similar warranties of quality.<sup>60</sup> If warranty protection is incident to the lease of goods, the protection could be extended to the lease of housing. Considering the residential tenant's reliance upon his landlord and the inappropriateness of antiquated rules of property law to govern the modern lease transaction, the tenant should be afforded the full protection offered by the implied warranties of fitness.

Thus construing a lease as basically contractual in nature, some jurisdictions have recently recognized an implied warranty of habitability as an integral part of a lease transaction.<sup>61</sup> The warranty of habitability creates an obligation on the part of the landlord to provide premises which are free of defects and fit for habitation at the inception of the lease.<sup>62</sup> Defects which existed at the time

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<sup>55</sup> U.C.C. § 2-715 (2)(b).

<sup>56</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970).

<sup>57</sup> U.C.C. §§ 2-314, 2-315.

<sup>58</sup> See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970).

<sup>59</sup> See note 52 *supra*.

<sup>60</sup> E.g., *Cintrone v. Hertz Truck Leasing and Rental Service*, 45 N.J. 434, 212 A.2d 769 (1965).

<sup>61</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, (D.C. Cir. 1970), *cert. denied*, 400 U.S. 925 (1970); *Lemle v. Breeden*, 51 Hawaii 426, 462 P.2d 470, 40 A.L.R. 3d 637 (1969); *Jack Spring, Inc. v. Little*, 50 Ill.2d 351, 280 N.E.2d 208 (1972); *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970); *Reste Realty Corp. v. Cooper*, 53 N.J. 444, 251 A.2d 268 (1969); *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973).

<sup>62</sup> *Lemle v. Breeden*, 51 Hawaii 426, 433, 462 P.2d 470, 474, 40 A.L.R.3d 637 (1969); *Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971); *Marini v. Ireland*, 56 N.J. 130, 144, 265 A.2d 526, 533 (1970).

the lease was entered into, and which rendered the premises unfit for habitation, would constitute a breach of the implied warranty of habitability.<sup>63</sup> There is a question, however, whether or not defects which arise *after* the lease was entered into would constitute a breach of warranty. At least two cases have suggested that as the tenants continue to pay the rent, they are entitled to expect that the landlord will continue to maintain the premises in a habitable condition.<sup>64</sup> Such a construction charges the landlord with an obligation to make the repairs necessary to maintain the premises in the same condition as at the inception of the lease. In other words, the landlord must make the repairs necessary to keep the premises fit for the purposes for which they were intended. Failure to do so would be a breach of warranty. "Adoption of this view makes available to the tenant the basic contract remedies of damages, reformation and rescission."<sup>65</sup> These remedies for the breach of a warranty of habitability closely parallel the remedies provided by the Uniform Commercial Code for the breach of an implied warranty in the sale of goods.<sup>66</sup> Extending the analogy, it follows that since the Uniform Commercial Code provides that any person injured as a result of a breach of warranty may recover damages,<sup>67</sup> damages for personal injury should also flow from a landlord's breach of a warranty of habitability. The recovery should not be limited by the fact that the landlord and the injured party were not in privity with each other.<sup>68</sup>

Reliance upon the contractual nature of a lease as the source of the warranty of habitability is not without its problems. When dealing with the doctrines of contract law, notice must be taken of the intent of the parties. A purchaser who buys goods "as is" or with full knowledge of the defects does not have the benefit of warranty protection.<sup>69</sup> Similarly, a tenant who was aware of defects on the premises may have been willing to accept the premises despite the defects, especially if he was able to negotiate lower rent payments.<sup>70</sup> In such a case, the tenant likewise should be removed from the scope of warranty protection.

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<sup>63</sup> The defect of *Sargent* appears to have existed at the inception of the lease. The dangerously steep nature of the stairway was a major structural defect which had existed since the construction of the stairs.

<sup>64</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1079 (D.C. Cir. 1970):

We point out that in the present cases there is no allegation that [the] apartments were in poor condition or in violation of the housing code at the commencement of the leases. Since the lessees continue to pay the same rent, they were entitled to expect that the landlord would continue to keep the premises in their beginning condition during the lease term.

*Kline v. Burns*, 111 N.H. 87, 92, 276 A.2d 248, 252 (1971):

This means that at the inception of the rental there are no latent defects in facilities vital to the use of the premises for residential purposes and that these essential facilities will remain during the entire term in a condition which makes the property livable.

<sup>65</sup> *Kline v. Burns*, 111 N.H. at 93, 276 A.2d at 252.

<sup>66</sup> U.C.C. § 2-711.

<sup>67</sup> U.C.C. § 2-715 (2)(b).

<sup>68</sup> U.C.C. § 2-318.

<sup>69</sup> U.C.C. § 2-316 (3).

<sup>70</sup> The dissenters in *Foisy v. Wyman* argued that the tenant had agreed to accept the premises with the existing defects:

From [the] testimony it is perfectly clear that the [tenant] was fully aware of the

However, there are many instances in which the tenant's "agreement" to accept defects and poor conditions is a sham. The landlord will often possess superior bargaining power. If that bargaining power is used unfairly, the tenant should not be held to the objectionable conditions and terms of the lease. In transactions for the sale of goods, an unfair "agreement" may render the contract unenforceable under the Uniform Commercial Code's section on "unconscionability."<sup>71</sup> The doctrine of unconscionability could easily be applied to lease transactions. A recent case illustrates:

It can be argued, however, that the [tenant] should not be entitled to the protection of an implied warranty of habitability since he knew of a substantial number of defects when he rented the premises and the rent was reduced . . . We believe this type of bargaining by the landlord with the tenant is contrary to public policy and the purpose of the doctrine of implied warranty of habitability. A disadvantaged tenant should not be placed in a position of agreeing to live in an uninhabitable premises [sic]. Housing conditions, such as the record indicates exist in the instant case, are a health hazard, not only to the individual tenant, but to the community which is exposed to said individual.<sup>72</sup>

B. *The Legislative Intent Inherent In The Housing Codes Gives Rise to a Warranty of Habitability*

The initial cases which recognized a warranty of habitability in a residential lease put emphasis on the contractual nature of such a lease.<sup>73</sup> Later cases, however, have found it unnecessary to dwell on the contractual nature of a residential lease;<sup>74</sup> the most recent decision appears to assume the contractual nature of the transaction.<sup>75</sup> The thesis of many recent decisions has been that the existence of a warranty of habitability rests on considerations of public policy as manifested by housing codes.

A plethora of legislation has imposed new obligations upon property owners requiring the maintenance of the property in a safe condition. Such legislative action has obviated the common law rules of the landlord-tenant relationship. This legislative awareness of the need for tenant protection has served as the foundation for the imposition of an implied warranty of habitability:

Legislation and administrative rules, . . . building codes, and health regulations, all impose certain duties on a property owner with respect to

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defects and deficiencies in the premises. Those defects and deficiencies were the very reason he was willing and able to negotiate lower payments.

It requires no authority to sustain the proposition that a person who takes possession of premises with known defects, intends to repair those defects, bargains for reduced monthly payments and characterizes the transaction as a "deal" which he "grabbed," neither deserves nor needs the protection of an implied warranty of habitability.

Foisy v. Wyman, 515 P.2d 160, 169 (Wash. 1973) (dissenting opinion).

<sup>71</sup> U.C.C. § 2-302.

<sup>72</sup> Foisy v. Wyman, 515 P.2d 160, 164 (1973).

<sup>73</sup> E.g., Javins v. First Nat'l Realty Corp., 428 F.2d 1071, 1075 (D.C. Cir. 1970).

<sup>74</sup> See, e.g., Kline v. Burns, 111 N.H. 87, 276 A.2d 248 (1971).

<sup>75</sup> In Foisy v. Wyman, 515 P.2d 160, 164 (Wash. 1973), reference is made to "all contracts for the renting of premises."

the condition of his premises. Thus, the legislature has made a policy judgment—that it is socially (and politically) desirable to impose these duties on a property owner—which has rendered the old common-law rule obsolete. To follow the old rule of no implied warranty of habitability in leases would, in our opinion, be inconsistent with the current legislative policy concerning housing standards. The need and social desirability of adequate housing for people in this era of rapid population increases is too important to be rebuffed by that obnoxious legal cliché, *caveat emptor*. Permitting landlords to rent “tumble-down” houses is at least a contributing cause of such problems as urban blight, juvenile delinquency, and high property taxes for conscientious landowners.<sup>76</sup>

The use of the housing code as the source of the warranty of habitability appears to offer greater protection to tenants than the “lease as a contract” theory. The enforcement of housing codes “has been far from uniformly effective.”<sup>77</sup> The imposition of an implied warranty can inject new vitality into a housing code by establishing the landlord’s duty to repair as co-extensive with the minimum standard set forth in the code.<sup>78</sup> In this manner a breach of the warranty of habitability occurs when there is a significant violation of the housing code.<sup>79</sup> Whether the defect arose before the inception of the lease or after the tenant took possession would be irrelevant.<sup>80</sup>

The most serious problem created by regarding the contractual nature of a lease as the source of a warranty of habitability is that the parties may intentionally waive warranty protection.<sup>81</sup> Although such a waiver might be found to be unconscionable, the possibility remains that a court might decide that the tenant has bargained away his right to warranty protection. No such problems arise with a warranty derived from legislative intent. The duties imposed by the warranty of habitability may not be “waived or shifted by agreement if the [housing code] specifically places the duty upon the [landlord].”<sup>82</sup>

Where an implied warranty of habitability exists, regardless of the source, the landlord bears responsibility for the repairs to maintain the property in a safe condition. Such a warranty to make necessary repairs is totally inconsistent with the idea that a landlord is immune from tort liability for injuries resulting from a failure to make necessary repairs. On the contrary, a warranty to repair creates a legal duty to repair, and a breach of this duty should serve as the

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<sup>76</sup> *Pines v. Persson*, 14 Wis. 2d 590, 595-96, 111 N.W.2d 409, 412-13 (1961). This passage from *Pines* is quoted in *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082; *Marini v. Ireland*, 56 N.J. at 142, 265 A.2d at 532; *Reste Realty Corp. v. Cooper*, 53 N.J. at 454, 251 A.2d at 273; *Foisy v. Wyman*, 515 P.2d at 163.

<sup>77</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082. See text beginning at note 90 *infra*.

<sup>78</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082; *Jack Spring, Inc. v. Little*, 50 Ill.2d at 366, 280 N.E.2d at 217.

<sup>79</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1082. *Sargent* made no mention of a housing code, but in New Hampshire a breach of the warranty of habitability occurs when a defect exists which will render the premises unsafe. *Kline v. Burns*, 111 N.H. at 93, 276 A.2d at 252.

<sup>80</sup> Regarding the housing code as the source of the warranty of habitability would therefore eliminate the problems discussed in the text beginning at note 62 *supra*.

<sup>81</sup> See text beginning at note 69 *supra*.

<sup>82</sup> *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1081-82.

basis of tort liability. In this manner a warranty of habitability would not only provide a contractual remedy for personal injuries, but would provide the basis for imposing tort liability as well. The *Sargent* decision points out this fact.<sup>83</sup> Therefore, it was appropriate for the landlord to "bear the cost of repairs necessary to make the premises safe."<sup>84</sup> Having failed to make such repairs, the landlord had failed to exercise due care under the circumstances and "the jury could find that the [landlord] was negligent in the design or construction of the steep stairway or in failing to take adequate precautionary measures to reduce the risk of injury."<sup>85</sup> Regardless whether one adopts a contract or tort theory of recovery, an implied warranty of habitability imposes liability on the landlord. Contractual liability arises from the breach of warranty. Tort liability arises from the breach of the duty to repair, the duty having originated with the implied warranty of habitability.

In the process of updating the law governing the landlord-tenant relationship, the courts have frequently focused on the needs of tenants in large multi-dwelling units.<sup>86</sup> It is interesting to note that multi-dwelling units existed throughout the expanse of common law England. "It is significant that the only numerous multiple dwellings known to common law—inns, and later rooming houses—were governed by a law quite unlike that relating to leases."<sup>87</sup> The innkeeper enjoyed no immunity from tort liability. The courts were slow to recognize the similarities between innkeepers and modern apartment landlords, but recent decisions have made the comparison.<sup>88</sup> "[I]t is the innkeeper and not the agrarian landlord who approximates the modern landlord; it is the guest and not the farmer-tenant who resembles the urban tenant."<sup>89</sup> Recognition of the innkeeper analogy, although long overdue, coincides with the proposition that a landlord has a duty to deliver a habitable dwelling to his tenant.

### C. *The Existing Housing Codes Offer Inadequate Protection to Injured Persons*

The *Sargent* decision made no mention of any local statute or ordinance which required the landlord to maintain the premises in good condition. But many jurisdictions, recognizing a need for some change in the law governing the duties of a landlord, have passed such statutes requiring the landlord to maintain and repair leased property.<sup>90</sup> It could be argued that the landlord's failure to comply with the statute constitutes negligence per se. As indicated above such a statute may also serve as the basis of an implied warranty of habitability,<sup>91</sup> thereby

<sup>83</sup> New Hampshire was among the vanguard of jurisdictions which recognized a warranty of habitability in a lease agreement. *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

<sup>84</sup> *Sargent v. Ross*, 308 A.2d at 535, quoting *Kline v. Burns*, 111 N.H. at 92, 276 A.2d at 251.

<sup>85</sup> *Id.* at 535.

<sup>86</sup> *E.g.* *Javins v. First Nat'l Realty Corp.*, 428 F.2d at 1078.

<sup>87</sup> MODEL RESIDENTIAL LANDLORD-TENANT CODE, 6 (tent. draft 1969).

<sup>88</sup> *Kline v. 1500 Massachusetts Ave. Apartment Corp.*, 439 F.2d 477, 482 (D.C. Cir. 1970); *Clarke v. O'Connor* 435 F.2d 104, 112 (D.C. Cir. 1970); *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1077 n. 33 (D.C. Cir. 1970).

<sup>89</sup> 59 GEO. L.J. 1153, 1168 (1971).

<sup>90</sup> 2 R. POWELL, REAL PROPERTY § 233 (rev. ed. 1973).

<sup>91</sup> See sources cited in note 76 *supra*.

imposing contractual liability upon the landlord should the warranty be breached. Therefore, any consideration of the landlord's tort liability must be viewed in light of what duties, if any, are imposed on the landlord by local housing codes.

The statutes are generally of three types. The first type contains provisions stating in general terms that the landlord is under a duty to keep the premises in good repair.<sup>92</sup> Most states with statutes of this type have held the landlord liable in tort for a breach of the statutory duty.<sup>93</sup> However, not all jurisdictions have so held,<sup>94</sup> and a statute of this type may be judicially interpreted so as not to impose tort liability on the landlord.

The second type of statute requires the landlord to maintain the premises in good condition and, upon his failure to do so, allows the tenant to either make the repairs and deduct the cost from the rent or to vacate the premises with no further liability for rent.<sup>95</sup> Jurisdictions with this type of statute have usually refused to impose a statutory duty in tort upon the landlord. Instead, they tend to regard the legislative provisions as exclusive and consider the tenant's remedies limited to those provided by the statute.<sup>96</sup>

The third type of statute requires the landlord to maintain the premises in good condition and "expressly provide[s] for recovery in tort by those persons injured on the leased premises."<sup>97</sup> This type of statute presents few problems of interpretation for the courts. The legislature has expressly abrogated the common law rule and extended tort liability to landlords.<sup>98</sup> The express imposition of tort liability on landlords by such legislation offers the protection necessary to safeguard parties injured as a result of the landlord's lease of unsafe premises.

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<sup>92</sup> *E.g.*, N.Y. MULTIPLE DWELLING LAW § 78 (McKinney 1946) Repairs. "Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section. . . ."

<sup>93</sup> Annot., 17 A.L.R.2d 704, 708 (1951).

<sup>94</sup> *Id.* at 711-12.

<sup>95</sup> *E.g.*, Cal. Civil Code §§ 1941, 1942(a) (West Supp. 1973).

§ 1941. Buildings for human occupancy; fitness; repairs.

The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable. . . .

§ 1942. Repairs by lessee; rent deduction; limit.

(a) If within a reasonable time after notice to the lessor, of dilapidations which he ought to repair, he neglects to do so, the lessee may repair the same himself, where the cost of such repairs does not require an expenditure greater than one month's rent of the premises, and deduct the expenses of such repairs from the rent, or the lessee may vacate the premises, in which case he shall be discharged from further payment of rent, or performance of other conditions. This remedy shall not be available to the lessee more than once in any 12-month period.

<sup>96</sup> Annot., 17 A.L.R.2d 704, 721 (1951).

<sup>97</sup> 62 HARV. L. REV. 669, 675 (1949).

<sup>98</sup> *E.g.*, GA. CODE ANN. § 61-112 (1966).

Liability of landlord for negligence of tenant and for failure to repair.

The landlord, having fully parted with possession and right of possession, is not responsible to third persons for damages resulting from the negligence or illegal use of the premises by the tenant; but he is responsible to others for damages arising from defective construction or for damages from failure to keep the premises in repair.

Unfortunately, most states have enacted statutes which contain no express intention of the legislature to impose tort liability upon the landlord. The vast majority of the states have passed statutes of the first and second types,<sup>99</sup> and only a small number of those jurisdictions have held that such statutes are implicitly intended to impose tort liability on the landlord.<sup>100</sup> The housing codes purport to protect the poor and disadvantaged from exploitation by economically powerful landlords. It is a hollow protection which leaves the tenant open to suit for injuries to third parties incurred on the premises as a result of the landlord's leasing of an unsafe tenement. It is an even stranger protection when the tenants themselves receive no compensation for injuries they may receive as the result of dangerous conditions on the premises. But, in fact, most of these statutes impose no tort liability on the landlord even when the injuries are the direct result of the landlord's non-compliance with the statute.

Even when the courts have imposed tort liability based on housing codes, landlords have developed numerous methods for circumventing the statutes. For instance, a clause in the lease shifting the burden of making repairs from the landlord to the tenant may obviate the statutory duty. And the presence of exculpatory clauses in the lease has been interpreted to release the landlord from any liability.<sup>101</sup> It is easy to see that a shrewd landlord can generally avoid tort liability even when such liability may result as a function of a statutory duty.

Considering the ineffectiveness of most statutory remedies, there is need for more adequate protections. Some courts have put teeth into the housing codes of their jurisdictions by recognizing an implied warranty of habitability in an apartment lease.<sup>102</sup> New Hampshire was among those jurisdictions which recognized the existence of such a warranty.<sup>103</sup> The *Sargent* court made the ineluctable extension of the warranty of habitability by abolishing the landlord's tort immunity.

*Sargent*, then, illustrates the proposition advanced earlier in this discussion that the abolition of landlord tort immunity is the logical extension of the implied warranty of habitability in a lease transaction. In order for other jurisdictions to adopt the *Sargent* rule, they may first have to recognize a warranty of habitability as an integral part of a residential lease. However, considering the contractual nature of a lease and the legislative intent inherent in the housing codes, the recognition of such a warranty should present no difficulty.

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<sup>99</sup> See Annot., 17 A.L.R.2d 704 (1951).

<sup>100</sup> Tort liability has been found to exist due to a statutory duty in California, Georgia, Louisiana, Massachusetts, Michigan, New York, Tennessee and Wisconsin. 2 R. POWELL, REAL PROPERTY § 234(2)(e) (rev. ed. 1973).

<sup>101</sup> Feuerstein & Shestack, *Landlord and Tenant—The Statutory Duty To Repair*, 45 ILL. L. REV. 205, 220-25 (1950).

<sup>102</sup> An implied warranty of habitability can give new vitality to an ineffective housing code if the standard of conduct used to determine whether there has been a breach of the warranty is made co-extensive with the landlord's duties set forth in the housing code. The warranty becomes particularly effective when the breach thereof may be raised as an affirmative defense in an unlawful detainer action. See, e.g., *Foisy v. Wyman*, 515 P.2d 160 (Wash. 1973).

<sup>103</sup> *Kline v. Burns*, 111 N.H. 87, 276 A.2d 248 (1971).

## IV. CONCLUSION

In repudiating the doctrine of landlord tort immunity, the *Sargent* court adopted a new standard with which to judge the conduct of a landlord: the standard of care required by the general law of negligence. Such a duty would not seem to impose an excessive burden upon the landlord. His duty is to take "whatever precautions are *reasonably necessary under the circumstances* to reduce the likelihood of injuries from defects in his property."<sup>104</sup> In short, the landlord must shoulder responsibility for the general condition of the premises. No longer should he be able to allow the premises to become dangerous due to lack of repairs and still avoid tort liability.

Problems arise when one attempts to discern what is reasonable under the circumstances. The *Sargent* decision does not purport to impose liability upon the landlord for all injuries incurred on the property. He is only liable for those injuries which are the result of his unreasonable conduct.<sup>105</sup> For example, injuries may result from defective conditions within a leased apartment. The landlord should not be liable for such injuries unless he has failed to take reasonable precautions under the circumstances. If the tenant has informed the landlord of the need for repairs, and the landlord has delayed unreasonably in making such repairs, then the landlord has probably failed to act reasonably under the circumstances. If the tenant has not informed the landlord of the need for repairs, then in all probability no liability should be imposed. To hold otherwise would charge the landlord with a duty to inspect the apartment of his tenant. Absent an agreement to the contrary, the landlord has no right to inspect the apartment,<sup>106</sup> and the *Sargent* decision does not purport to make inspection of the leased premises necessary. It is obvious that "under the circumstances" implies the necessity of notice, and absent notice the landlord is not liable because the risk of harm would not be foreseeable. Therefore, the landlord is only under a duty to repair defects within the apartment of which he has notice. Outside the individual apartments, the landlord is presumed to have notice of *any* defects since he could easily inspect such portions of the premises without infringing upon the rights of his tenants.<sup>107</sup> Therefore, the landlord should be liable if he knew or should have known that the defect existed and was in need of repair.

There was evidence in *Sargent* that the landlord had negligently constructed the stairway and failed to remedy the existing danger. Therefore, the landlord knew or should have known of the risk of possible harm, and her failure to repair was unreasonable under the circumstances. In the future landlords can avoid tort liability by making adequate repairs of all defects within a reasonable time after notice of the need for such repairs.

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<sup>104</sup> 308 A.2d at 355 (emphasis added).

<sup>105</sup> *Id.* at 532.

<sup>106</sup> As a general rule, unless the landlord has reserved a right to enter in the lease agreement, the landlord has no right to enter "to investigate as to the need of repairs." 49 AM. JUR. 2d *Landlord & Tenant* § 227 (1970).

<sup>107</sup> The leasing of individual houses would present a different situation. Houses are usually accompanied by adjacent yards. The house as well as the yard are normally rented to the tenant. The landlord in this case would not be presumed to have notice of exterior defects because he could not inspect the premises without committing trespass. For house rentals, the landlord should be under a duty to make repairs only when he has *actual notice* of defects.



Another alternative, however, may suggest itself to the astute landlord. The scope of his duty would be greatly reduced by a lessee's covenant to repair. If the tenant agrees to repair, the landlord, under the circumstances, is under no duty. The tenant has absolved the landlord of responsibility. Injured third parties would then sue the negligent tenant rather than the landlord. There is no reason why a tenant's covenant to repair should not free the landlord from liability provided such an agreement is not unconscionable. To the tenant of a residential unit, however, such a transfer of the duty to repair could arguably be found unconscionable in many cases. For a large building with numerous tenants, the number and complexity of repairs involved are such that the landlord is generally much better suited to undertake such a task. Courts have often recognized this fact.<sup>108</sup> Also, in urban housing situations, the tenant often lacks any significant bargaining power in dealing with the landlord. Tenant covenants to repair in these instances might be unconscionable. A landlord who negotiated such an agreement should not escape liability for injuries resulting from the dangerous conditions of the premises. The unconscionable agreement would not constitute *reasonable precautions under the circumstances to reduce the likelihood of injuries*.

For each one of the infinite possibilities which may arise, the final analysis will involve the determination of what was reasonable under the circumstances. If it would be reasonable to expect the landlord to remedy the defect, then he will have to accept the responsibility for his failure to act.

It is not suggested that abrogation of the landlord's tort immunity will substantially alleviate all unsatisfactory urban housing conditions. This decision does not purport to be a panacea for the ills of oppressed tenants. But it does have two positive effects. First, it frees tenants from liability for injuries caused to third parties by dangerous conditions which they are powerless to remedy. More importantly, it gives the tenant a cause of action against his own landlord for the tenant's injuries due to the unreasonably dangerous condition of the premises. By expanding the landlord's tort liability, a better opportunity for adequate compensation is offered to injured parties since landlords would generally be in a better economic position to pay damages than would most tenants. The imposition of tort liability also offers more motivation for the landlord to remedy dangerous conditions on the property. Such action may help to improve the quality of housing which will be available to urban tenants.<sup>109</sup>

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<sup>108</sup> 62 HARV. L. REV. 669, 671 (1949). See sources cited in note 46 *supra*.

<sup>109</sup> Before urban jurisdictions can adopt the *Sargent* doctrine, a determination must be made as to how much it will cost. Society is generally willing to accept reasonably safe conditions as opposed to absolutely safe conditions because "absolutely safe" costs too much. For example, we drive reasonably safe automobiles because absolutely safe autos would be too slow and too expensive.

The cost of providing defect-free urban housing may prove to be excessive. If the landlord must spend several thousand dollars to avoid tort liability, he may not be willing to make the expenditures, but choose instead to invest his money elsewhere. This would only increase the public burden to provide suitable housing. If the landlord does make the expenditures, he will pass them on by means of a rent increase. Many tenants may be unwilling to accept the increases, and that class of tenants which are in most need of the improvements—slum residents—are probably the least able to pay. Once again the ultimate cost may have to be spread amongst the entire public. Until the cost question is answered by empirical data, the adoption of the *Sargent* doctrine may be limited to predominantly rural jurisdictions; they may be the only ones able to afford it.

The once justifiable basis for landlord tort immunity no longer exists. A rule designed to meet the purposes of an agrarian society no longer suits the needs of an industrial community. Society progresses, and the law must follow suit. As new relationships develop, new rules must evolve to afford the parties adequate protection. Modern conditions surrounding the landlord-tenant relationship necessitate new legal formulations. The tenant's reliance and dependence upon the landlord to provide a suitable dwelling and numerous ancillary services require a new interpretation of the complete transaction. What was once a simple property conveyance has become a complex contractual arrangement subject to the accompanying warranties of sales agreements. When the tenant relies on the landlord to deliver a suitable dwelling, there is no justification for allowing a landlord to provide defective property and then claim immunity. The law should demand that the landlord accept liability for the foreseeable consequences of his conduct.

The rationales supporting *Sargent v. Ross* compel its acceptance by other jurisdictions. The decision does not rest on local precedent, but instead reveals an unusual reliance upon legal scholarship. This is not to imply that case law has been ignored. In fact several of the decisions which the court cites as authority were partial reformations of the law of landlord-tenant. Realizing that this entire area of law was in much need of change,<sup>110</sup> the New Hampshire court took a crucial step in the process of reformation.<sup>111</sup>

*Curtiss Isler*

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**FEDERAL INCOME TAXATION—MEANING OF WILLFULNESS FOR TAX FELONIES AND MISDEMEANORS—*United States v. Bishop*, 412 U.S. 346 (1973).**

**I. BACKGROUND OF CASE**

Cecil J. Bishop, a California lawyer, was convicted of violating § 7206(1) of the Internal Revenue Code of 1954, which provides that anyone who "willfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter" is guilty of a felony (emphasis added). Bishop had taken improper deductions on his 1963, 1964, and 1965 income tax returns amounting to more than \$45,000. His defense was that he had only failed to check the returns for accuracy after his office secretary had prepared them. He contended that the kind of willfulness with which he had acted involved no more than gross negligence or carelessness, and thus could not have risen to the level of bad faith or evil motive required

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<sup>110</sup> 2 R. POWELL, REAL PROPERTY § 220 (rev. ed. 1973).

<sup>111</sup> This is not the first time that the New Hampshire supreme court has departed from traditional notions of tort liability. The court in general, and Chief Justice Kenison in particular, have been quite active in the reformation of inadequate and obsolete tort doctrines. See MacLeod, *Chief Justice Kenison And The Law Of Torts: A Comment On Process*, 48 B.U.L. REV. 175 (1968).

to establish a felony. On that basis, he requested a jury instruction for a lesser-included-offense.<sup>1</sup>

A lesser-included-offense instruction is appropriate if (1) some of the elements of the crime charged also constitute a lesser offense and (2) to convict of the greater crime, the jury must find a disputed material element not necessary to convict of the lesser. And here Bishop argued that the lesser offense was a violation of a misdemeanor statute, § 7207, which provides: "Any person who *willfully* delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or false as to any material matter, shall be fined not more than \$1,000, or imprisoned not more than 1 year, or both" (emphasis added). According to Bishop, the disputed element was the degree of scienter necessary to constitute a willful violation. His proposed instructions would have afforded the jury a choice between a misdemeanor based on caprice or careless disregard and a felony based on evil purpose.<sup>2</sup>

The district court refused Bishop's requested instructions and charged the jury only on the felony, instructing it to determine whether the defendant intended to disobey or disregard the law "with evil motive or bad purpose."<sup>3</sup> On appeal, the Court of Appeals for the Ninth Circuit reversed and declared: "Under the evidence presented the elements of the two offenses are the same, with the exception of the element of willfulness."<sup>4</sup> The Government's petition for certiorari was granted because of a divergence among the circuits regarding the meaning of willfulness to be applied in criminal tax cases.<sup>5</sup>

The Supreme Court upheld the district court's refusal to give the requested instruction and remanded to the court of appeals for consideration of other issues it had not reached.<sup>6</sup> The Court held that the standard of willfulness is the same in both felony and misdemeanor statutes in the criminal tax area. The

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<sup>1</sup> FED. R. CRIM. P. 31(c) provides: "The defendant may be found guilty of an offense necessarily included in the offense charged. . . ."

There are two approaches to the instruction. The common law formulation requires that all the *elements* of the lesser crime be present in the greater, so that it would never be possible to commit the greater without also having committed the lesser offense. 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 515 (1969). The more recent interpretation requires only that the *facts* adduced to prove the greater offense should also have proved a related lesser offense; under this approach inclusion is allowed even if some elements of the lesser crime are not found in the charged crime. See *United States v. Whitaker*, 447 F.2d 314 (D.C. Cir. 1971) (unlawful entry a lesser offense included within burglary on the facts even though, given the possibility of burglary after permitted entry, it contained an element not required for burglary). ALI MODEL PENAL CODE § 1.07(4) (Proposed Official Draft 1962) provides that an offense is included when "it is established by proof of the same or less than all the facts required to establish the commission of the offense charged."

The Government in *Bishop* chose the common law formulation of the lesser-included-offense rule. Brief for Appellant at 7. Bishop argued that his requested instruction was warranted by either the Government's chosen approach or the more modern interpretation. Brief for Respondent at 10.

<sup>2</sup> *United States v. Bishop*, 412 U.S. 346 (1973).

<sup>3</sup> 412 U.S. at 351.

<sup>4</sup> *United States v. Bishop*, 455 F.2d 612, 614 (9th Cir. 1972). The court of appeals used the more recent formulation of the lesser-included-offense rule, allowing inclusion based on evidence adduced.

<sup>5</sup> 412 U.S. at 348.

<sup>6</sup> *Id.* at 349.

Court did not expound on the meaning of willfulness except to state that it implies "a voluntary, intentional violation of a known legal duty" and that it requires "bad purpose or evil motive."<sup>7</sup>

The brief for Bishop made two arguments in favor of interpreting misdemeanor willfulness to require something less than the bad purpose or evil motive required in felony cases. First, such a standard would be consistent with that traditionally required for "other purely statutory misdemeanors,"<sup>8</sup> since willfulness is typically treated as meaning "intentional" in crimes which do not involve moral turpitude.<sup>9</sup> For instance, the Model Penal Code provides: "A requirement that an offense be committed wilfully is satisfied if a person acts knowingly with respect to the material elements of the offense, unless a purpose to impose further requirements appears."<sup>10</sup> "Knowingly" and "intentionally" fall short of the mental element of "bad purpose or evil motive." The *Bishop* Court did not address this point.<sup>11</sup>

Bishop's second argument concerned a potential overlap between tax felony and tax misdemeanor statutes which would arguably result from a uniform definition of willfulness.<sup>12</sup> Bishop contended that "but for" a variation in the level of willfulness, §§ 7206(1) and 7207 would be exact duplicates in the area of income tax returns. Section 6065(a)<sup>13</sup> provides that, subject to change by the Secretary or his delegate, each income tax return shall contain a written declaration that it is made under penalty of perjury. Treasury regulations<sup>14</sup> require everyone who signs a tax return to verify that it is made under penalty of perjury if the return contains such a declaration. Thus, asserted Bishop, it is impossible to file a false income tax return (a violation of § 7207) without incurring the penalty of perjury (a violation of § 7206(1)).<sup>15</sup>

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<sup>7</sup> *Id.* at 360, 361.

<sup>8</sup> Brief for Respondent at 18.

<sup>9</sup> R. PERKINS, CRIMINAL LAW 780 (2d ed. 1969).

<sup>10</sup> ALI MODEL PENAL CODE § 2.02(8) (Proposed Official Draft 1962).

<sup>11</sup> One author's discussion rebuts Bishop's contention:

As a practical matter, the turpitudinous element in what is now the misdemeanor and in what is the felony is the same. When a taxpayer decides that he is going to defraud the government, he does not choose between non-filing and filing fraudulently because one is more or less moral than the other; rather, he picks one instead of the other because he thinks that, with the one he picks, his chances of remaining undiscovered will be greater. Consequently, the distinction between the two crimes is meaningless.

Gilman, *Current Problems in Criminal Tax Fraud*, 33 TAXES 749, 751 (1955).

<sup>12</sup> Brief for Respondent at 13.

<sup>13</sup> CODE, § 6065(a) provides:

Except as otherwise provided by the Secretary or his delegate, any return, declaration, statement, or other document required to be made under any provision of the internal revenue laws or regulations shall contain or be verified by a written declaration that it is made under the penalties of perjury.

<sup>14</sup> Treas. Reg. § 1.6065-1(a) (1959) provides:

If a return, declaration, statement, or other document . . . is required by the regulations contained in this chapter, or the form and instructions . . . to contain or be verified by a written declaration that it is made under the penalties of perjury, such return, declaration, statement, or other document shall be so verified by the person signing it.

<sup>15</sup> Brief for Respondent at 12, 13.

The Court in the past has responded to such claims of overlap by initially assuming that Congress would not create criminal statutes which are identical as to the elements of the offense but which vary as to penalty.<sup>16</sup> At the same time, the Court has always recognized that some criminal tax statutes are specific and thus may be included within other more general ones.<sup>17</sup> Even so, the Court has been more willing to find a complete overlap of statutes on a given state of facts than to define willfulness as a variable.<sup>18</sup>

In *Bishop*, the Court took the position that tax statutes with otherwise distinguishable elements do not overlap merely because they share a common element of willfulness. "Congress distinguished the statutes," observed the Court, "in ways that do not turn on the meaning of the word 'willfully.'"<sup>19</sup> In general, felonies are differentiated from misdemeanors by the "additional misconduct" required for felonies.<sup>20</sup>

In this case, the Court found various grounds on which to distinguish § 7206(1) from § 7207. For instance, Congress has authorized the Secretary or his delegate to eliminate the perjury declaration on returns. Such action would render § 7206(1) inoperative but would not affect § 7207. Furthermore, the felony section applies only to the *maker* of a return who does not *believe* it to be true, whereas the misdemeanor section includes *anyone*, whether or not he is the maker, who delivers or discloses a return which he *knows* to be false. Thus the Court was able to differentiate the sections wholly in terms of elements other than willfulness.

## II. DEFINITION OF WILLFULNESS

After *Bishop*, the definition of willfulness is uniform in all the offenses included in §§ 7201 to 7207. In order to establish that a violation was willful, the Government must prove: (1) a legal duty;<sup>21</sup> (2) knowledge of that duty;

<sup>16</sup> *Achilli v. United States*, 353 U.S. 373 (1957); *Berra v. United States*, 351 U.S. 131, 135 (1956) (Black, J. dissenting). One writer supports this assumption: "If a defendant can be indicted on the same state of facts for either a felony or a misdemeanor, it would follow that a grand jury or the U.S. Attorney or both together would have uncontrolled power to say how a person filing a false income tax return shall be prosecuted and punished." Comment, *Alternative Criminal Penalties for Willfully Filing a False Income Tax Return*, 105 U. PA. L. REV. 82, 86 (1956).

<sup>17</sup> "[Section 7201] necessarily includes among its elements actions which, if isolated from the others, constitute lesser offenses in this hierarchical system of sanctions." *Sansone v. United States*, 380 U.S. 343, 351 (1965).

<sup>18</sup> See *Sansone v. United States*, 380 U.S. 343 (1965); *Berra v. United States*, 351 U.S. 131 (1956).

<sup>19</sup> 412 U.S. at 358.

<sup>20</sup> *Id.*

<sup>21</sup> The duty contained in each Code section is listed below:

Section	Duty
7201	Not to evade tax or payment thereof
7202	Collect or account for and pay over taxes
7203	Pay taxes, make returns, keep records, supply information
7204	Deduct or withhold employment taxes, furnish statement
7205	Supply information to employer
7206(1)	Make and subscribe form believed true and correct as to every material matter
7206(2)	Not to participate in preparation of document known to be false
7207	Not to deliver or disclose false document

(3) a violation of the duty which is voluntary and intentional.<sup>22</sup> In addition, the Court in *Bishop* declared that it "shall continue to require, in both tax felonies and tax misdemeanors that must be done 'willfully,' the bad purpose or evil motive described in *Murdock*. . . ."<sup>23</sup>

The *Bishop* Court does not define "bad purpose or evil motive" except by reference to the Court's use of those terms in *Murdock*.<sup>24</sup> In that case, the taxpayer refused to supply information in violation of the predecessor to § 7203<sup>25</sup> and invoked his fifth amendment right against self-incrimination in good faith but without legal grounds. His failure to supply information was held not willful. Unfortunately, the *Murdock* opinion does not elaborate on the language it uses ("act done with a bad purpose"). It does, however, list three supporting Supreme Court cases. Two of these cases held that bad purpose requires *more* than a knowing violation,<sup>26</sup> while the third case held sufficient "a specific intent to violate the statute."<sup>27</sup> Despite the discrepancies among the cases upon which it relied, *Murdock* itself explicitly rejects the position that an intentional violation of a tax misdemeanor statute without an evil motive is enough to establish willfulness.<sup>28</sup> The reference to *Murdock* in the *Bishop* opinion may therefore imply the latter Court's acceptance of the proposition that bad purpose or evil motive is not the equivalent of an intentional violation of a tax obligation.<sup>29</sup>

But the requirement of bad purpose or evil motive in order to establish willfulness is objectionable for two principal reasons. First, the Government, in order to prove an element of the offense, and the defendant, in order to fashion his defense, would have to develop standards by which to separate good purposes or motives from evil ones. The difficulty of defining in this context what constitute "good" motives has been perceptively identified by one court: "Would it be a good purpose to fail to pay income taxes in order to pay medical expenses for a sick wife or child? Would it be a bad purpose to fail to pay taxes to use the money to bet on horse races?"<sup>30</sup>

The jury instructions on willfulness prepared by the Judicial Conference Committee on Jury Instructions of the Seventh Circuit provide one uncontrovertible definition of a bad purpose: "evading a known tax obligation in order to defraud the government of that tax."<sup>31</sup> However, this instruction was prepared for felony

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<sup>22</sup> 412 U.S. at 360.

<sup>23</sup> 412 U.S. at 361.

<sup>24</sup> *United States v. Murdock*, 290 U.S. 389 (1933).

<sup>25</sup> INT. REV. ACT OF 1928, § 146(9).

<sup>26</sup> *Felton v. United States*, 96 U.S. 699 (1877); *Potter v. United States*, 155 U.S. 438 (1894).

<sup>27</sup> *Spurr v. United States*, 174 U.S. 728, 735 (1899).

<sup>28</sup> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by bad faith or evil intent, which the statute makes an element of the offense." 290 U.S. at 397-98.

<sup>29</sup> "*Murdock* seems to indicate that, to find willfulness under the misdemeanor statute, the omission must be more than a voluntary and intentional failure done without justifiable legal excuse. It must be done with an evil motive, evil intent, bad purpose, and/or bad faith." Orlando, "Willfully" Under Section 7203 of the Internal Revenue Code of 1954, 74 DICK. L. REV. 563, 569 (1970).

<sup>30</sup> *United States v. Martell*, 199 F.2d 670, 672 (3d Cir. 1952).

<sup>31</sup> TAX FRAUD 250 (G. Holmes & J. Cox eds. 1973); see E. MORTENSON, FEDERAL TAX FRAUD LAW § 68 (1958): "The intent to evade taxation is of itself an evil purpose."

tax offenses. Tax misdemeanors do not require the existence of a tax liability as do the felony provisions of § 7201, so a purpose to defraud the Government of a tax due and owing does not exhaust the possible bad purposes for tax offenses.

Moreover, neither *Bishop* nor *Murdock* indicated whether bad purpose or evil motive refers to the immediate intent or, instead, to an ultimate goal.

A person often acts with two or more intentions. These intentions may consist of an immediate intention (intent) and an ulterior one (motive), as where the actor takes another's money intending to steal it and intending then to use it to buy food for his needy family.<sup>32</sup>

If a taxpayer fails to file a return because he believes it is an invasion of privacy or fails to pay a tax because he is morally outraged at expenditures of government revenues, he has an immediate intent to prevent the Government from receiving the return or the taxes. The taxpayer's *motive* may not be evil, but his *intention* is to violate a known duty. If the *Bishop* Court is directing the lower courts to focus on motive in order to identify willfulness, it has created an element of a tax offense which is almost unsusceptible of proof.

Relief from such a heavy prosecutorial burden may be obtained by defining motive or purpose to mean intent. At least one court has managed to perform such a sleight of hand:

[T]he only bad purpose or bad motive, which it is necessary for the Government to prove in this case is the deliberate intention not to file returns which the defendant knew ought to have been filed, so that the Government would not know the extent of the liability.<sup>33</sup>

To the extent that the preceding definition makes motive synonymous with intent it is unfortunate and clearly erroneous.<sup>34</sup> Nevertheless, an inference that the *Bishop* Court had in mind just such a definition can be drawn from its stated reason for requiring bad purpose or evil motive. The Court said it was implementing the intent of Congress to protect the "well-meaning, but easily confused, mass of taxpayers"<sup>35</sup> from the imposition of criminal penalties. However, this avowed purpose can be easily achieved by merely requiring an *intentional* violation of a known duty; injecting evil motive into the criminal tax scheme is surplusage. No additional protection is afforded good faith taxpayers, and yet the Government is hamstrung by having to establish a defendant's motives as an element of the offense. It is doubtful, therefore, whether the Court furthered what it perceived to be congressional policy by defining willfulness, or intent, which is clearly an element of a criminal offense, in terms of motive, or purpose, which is not. It would seem unfortunate if, as a result of *Bishop*, courts were to become preoc-

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<sup>32</sup> W. LAFAVE & A. SCOTT, JR., CRIMINAL LAW 200 (1972) (footnote omitted).

<sup>33</sup> *Yarborough v. United States*, 230 F.2d 56, 61 (4th Cir. 1956). A district court considerably weakened this definition by interpreting "so that" to mean "with the result that," thereby contradicting the *Murdock* requirement that bad purpose be more than intentional violation. *United States v. Fullerton*, 189 F. Supp. 211, 215 (D. Md. 1960).

<sup>34</sup> "Motive," as used in the context of criminal law, is usually synonymous with "reason" or "inducement," and is thus to be distinguished from the specific intent, knowledge, and bad purpose required to make out a tax offense. R. SCHMIDT, LEGAL AND ACCOUNTING HANDBOOK OF FEDERAL TAX FRAUD § 2.2 at 40 (1963).

<sup>35</sup> 412 U.S. at 361.

cupied with the subjective purity of the motives of a taxpayer whose violation was clearly intentional.

Although the meaning of willfulness remains unclear despite its extensive treatment by the Court, it is clear that willfulness requires a level of scienter at least equivalent to knowledge. Gross negligence or carelessness is no longer sufficient to establish willfulness. Also, the same standard of willfulness obtains in tax misdemeanors as in tax felonies. As a result, a lesser-included-offense instruction will not be available to defendants where the degree of willfulness is the only disputed element of the offense charged. Juries, deprived of the option of finding the accused guilty of a lesser crime, may be forced to grant felony convictions in cases which involve only a minimal degree of willfulness.

The failure of *Bishop* to dispell the confusion surrounding the meaning of willfulness is indicated by subsequent appellate court opinions which either have ignored the requirement of bad purpose or evil motive<sup>36</sup> or have paid lip service by reciting the words without elaboration.<sup>37</sup> The deficiencies in the opinion are unfortunate because the general criminal law has in the past borrowed its definition of willfulness from criminal tax cases.<sup>38</sup> The suggestion which emanates from *Bishop* that motive is intrinsic to willfulness could have far-reaching effect.<sup>39</sup>

### III. FUTURE EFFECTS OF BISHOP

*Bishop* can be read to support three contradictory propositions. The Court may have intended to make motive an element of every tax offense requiring willfulness. If so, the prosecutorial burden will be extremely heavy and valid defenses will abound. Another possible result is that the prosecution does not have to prove motive, but defenses based on lack of bad purpose or evil motive will be available. Defenses of this type were frequently asserted before *Bishop* without success, and their fate after *Bishop* is examined below. A third interpretation creates an equivalence between motive and intent, so that proof of an intentional violation of a known duty suffices to establish willfulness. Interpreted thus, the words "bad purpose or evil motive" add nothing of substance to the definition of willfulness. The existence of three defensible characterizations of *Bishop* muddies analysis of the results of the case. However, given that knowledge is now the minimum possible scienter requirement for willfulness, and that this level of scienter is uniform in tax felonies and tax misdemeanors, one can conjecture as to probable effects of *Bishop*.

#### A. On Governmental Prosecution

A major purpose of criminal tax prosecution is deterrence of potential future violators.<sup>40</sup> To that effect, possible cases undergo a screening procedure within

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<sup>36</sup> *United States v. DiVarco*, 484 F.2d 670 (7th Cir. 1973).

<sup>37</sup> *United States v. Andros*, 484 F.2d 531 (9th Cir. 1973).

<sup>38</sup> See, e.g., *United States v. Illinois Cent. R.R.*, 303 U.S. 239, 242 (1938); *Screws v. United States*, 325 U.S. 91, 101 (1945).

<sup>39</sup> For example, The Securities Act of 1933, 15 U.S.C. § 77X (1971) and The Securities Exchange Act of 1934, 15 U.S.C. § 78ff (1971) require a willful violation.

<sup>40</sup> Boughner, *How Practitioners Should Handle Willful Failure to File Cases*, 32 J. TAX. 46 (1970).



the Treasury Department to insure that only cases with an excellent chance of conviction are prosecuted. In 1971, seventy-two million returns out of over one hundred-thirteen million were mathematically verified, and the Intelligence Division of the Department of the Treasury forwarded to the Justice Department for prosecution only 1,021 income tax and miscellaneous criminal tax cases.<sup>41</sup>

Will this small number of cases decrease further in view of the fact that a showing of caprice or careless disregard will no longer be sufficient to establish a willful misdemeanor? It is difficult to determine how the greater burden of proof will affect government prosecutors, though they have long been faced with an identical burden in felony cases. It at least seems safe to predict that if the taxpayer is disreputable and there exists clear proof of a repetitive pattern of evasion, Treasury officials will recommend criminal prosecution notwithstanding lack of convincing proof of willfulness.<sup>42</sup> These considerations may mitigate the effect of *Bishop* on misdemeanor prosecutions.

Some misdemeanor statutes are so seldom used for prosecution that the *Bishop* definition of willfulness is irrelevant for them. Three of the four offenses contained in § 7203 have fallen into disuse: nonpayment of taxes, prosecution for failure to supply information, and prosecution for failure to keep records.<sup>43</sup> The very section *Bishop* wished to use as a lesser-included-offense, § 7207, is not only languishing from neglect, but the Treasury Department is actually lobbying for its repeal as useless.<sup>44</sup> Thus the willfulness standard for failure to pay taxes and for filing fraudulent returns has always been equivalent to a felony standard in practice, since those offenses have been prosecuted under the corresponding felony statutes or not at all.

One provision which may be seriously affected by a more stringent scienter requirement for willful misdemeanors is the "failure to file" charge, the only really viable part of § 7203. Speculation has been that "as data processing becomes more effective, it is likely that failure-to-file cases will be on the increase."<sup>45</sup> Despite this trend, the Government, after *Bishop*, may be reluctant to recommend prosecution under that section unless it can prove a repetitive pattern of failure to file and the taxpayer is not the sort likely to elicit sympathy from a jury.

## B. *On Defendants*

The number of cases forwarded to the Justice Department is directly related to the number of cases finally prosecuted. If the Government brings fewer tax fraud cases, fewer taxpayers will find themselves defending criminal charges.

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<sup>41</sup> McCall, *The Dimensions of Tax Fraud*, TAX FRAUD 15 (G. Holmes & J. Cox eds. 1973).

<sup>42</sup> H. BALTER, TAX FRAUD AND EVASION § 13.3 (3d ed. 1963). In *Holland v. United States*, 348 U.S. 121, 139 (1954), the Court gave its imprimatur to inferring willfulness from a consistent pattern of violations.

<sup>43</sup> R. SCHMIDT, LEGAL AND ACCOUNTING HANDBOOK OF FEDERAL TAX FRAUD 62 (1963).

<sup>44</sup> Lynch, *Basic Criminal Penalties*, TAX FRAUD 12 (G. Holmes & J. Cox eds. 1973). Section 7206 is increasingly used, according to Lyon, *The Major Penalties for Tax Fraud*, TAX FRAUD CASES 9 (Practising Law Institute, Tax Law and Practice—Course Handbook Series No. 12, 1969).

<sup>45</sup> Boughner, *How Practitioners Should Handle Willful Failure to File Cases*, 32 J. TAX. 46, 51 (1970).

A taxpayer who is unfortunate enough to become a defendant may be benefited by a greater range of possible defenses if *Bishop* has added motive to the elements of tax offenses, or has at least allowed benevolent motives as an independent defense. For example, the defense of emotional disturbance is often used by defendants and rarely accepted by courts.<sup>46</sup> After *Bishop*, a defendant's showing that he is incapable of forming the requisite evil motive for conviction may be a valid defense.<sup>47</sup> Similarly, an intent to comply in the future may be an acceptable defense as showing lack of bad purpose or evil motive.<sup>48</sup> A mistaken belief, albeit held perversely in the face of contradictory information, may now provide a defense even if motive is not considered an element, because it vitiates the knowledge or intent required for a willful violation.<sup>49</sup> In short, any explanation which is a believable alternative to a bad purpose or evil motive could conceivably defeat the criminal charge if motive is an element or a defense.

Although *Bishop* for the most part seems to aid defendants, it saddles them with at least one very clear disadvantage: the unavailability of a lesser-included-offense instruction when all the elements of the greater offense except willfulness are clearly proved.<sup>50</sup> On the other hand, if the Government's proof of willfulness after *Bishop* is doubtful enough to have warranted a lesser-included-offense instruction under the disapproved felony-misdemeanor willfulness dichotomy, that weakness should now warrant acquittal because the proof of willfulness would necessarily be inadequate to sustain a misdemeanor conviction. Logically, *Bishop* leaves the defendant's position either unchanged or strengthened as regards the effect of the Government's failure to meet the willfulness test.

In actuality, this must not be the case, else *Bishop* would not have appealed the district court's refusal of the lesser-included-offense instruction. It is apparent that providing a jury with an alternative offense on which to convict, even one much less severe than that charged, increases the chances of a finding that the Government failed to establish the requisite degree of willfulness for a felony conviction. If the only alternative is to acquit altogether, the jury is probably more hesitant to find insufficient the Government's proof of willfulness. If this analysis is correct (and it seems to be borne out in the *Bishop* case) to deny defendants a lesser-included-offense instruction on willfulness as a variable is to increase the chances of a felony conviction on a tenuous showing of willfulness.

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<sup>46</sup> See, e.g., *United States v. Haseltine*, 419 F.2d 579 (9th Cir. 1969); *United States v. Fahey*, 411 F.2d 1213 (9th Cir. 1969), *cert. denied*, 396 U.S. 957 (1969).

<sup>47</sup> See *Ritholz, Intent and Psychiatric Disturbances in Tax Fraud Cases*, N.Y.U. 23D INST. ON FED. TAX. 1339 (1965).

<sup>48</sup> This defense was held insufficient in *Sansone v. United States*, 380 U.S. 343, 353-54 (1965), and in *United States v. Edwards*, 375 F.2d 862 (9th Cir. 1967).

<sup>49</sup> For example, the belief that income as low as \$1,500 does not trigger the obligation to file income tax returns, *Martin v. United States*, 317 F.2d 753 (9th Cir. 1963); the belief that filing of a return must be accompanied by payment of the tax, *Abdul v. United States*, 254 F.2d 292 (9th Cir. 1958), *cert. denied*, 364 U.S. 832 (1960); *Ripperger v. United States*, 248 F.2d 944 (4th Cir. 1957), *cert. denied*, 355 U.S. 940 (1958).

<sup>50</sup> The Government may also be harmed by this result. A lesser-included-offense instruction has traditionally helped prosecutors whose cases were weak. See *Brief for Petitioner at 2*, *United States v. Bishop*, 412 U.S. 346 (1973); 2 C. WRIGHT, *FEDERAL PRACTICE AND PROCEDURE* § 515 (1969).

## IV. CONCLUSION

In the end, one returns to the lesser-included-offense context within which the *Bishop* case was heard. The Court chose to concentrate on the meaning of willfulness rather than on the question whether the lesser-included-offense instruction requested in this case would ever be appropriate.<sup>51</sup> While the unavailability of a lesser-included-offense instruction when the disputed element is willfulness is settled, the Court has yet to define the limits of the lesser-included-offense theory.

The Government must now show a voluntary and intentional violation of a known legal duty *and* bad purpose or evil motive. Exactly what bad purpose or evil motive means is unclear, largely because the *Bishop* Court approved *Murdock*'s definition without recognizing that *Murdock* is one of the principal sources of ambiguity in the interpretation of willfulness. Cases after *Bishop* will probably show that further clarification by the Supreme Court is required.

Diana S. Donaldson

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CONSTITUTIONAL LAW—INAPPLICABILITY OF THE UNCONSTITUTIONAL CONDITIONS DOCTRINE TO THE INTERNAL REVENUE CODE—*Christian Echoes National Ministry, Inc. v. United States*, 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

## I. INTRODUCTION

Corporations operated for religious, charitable, scientific, public safety testing, literary, and educational purposes are granted tax exempt status by § 501(c)(3) of the Internal Revenue Code.<sup>1</sup> This exemption, however, is not available to organizations that spend a substantial part of their activities attempting to influence legislation.<sup>2</sup> In *Christian Echoes National Ministry, Inc. v. United States*,<sup>3</sup> the United States Court of Appeals for the Tenth Circuit expansively construed the § 501(c)(3) limitation on "attempting to influence legislation," and held that the statute abridged neither the freedom of speech nor freedom of religion of the taxpayer. In its opinion, the court implicitly rejected the unconstitutional conditions doctrine, which says that the government cannot condition the granting of its privileges or benefits on the waiver of constitutionally guaranteed rights.

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<sup>51</sup> 412 U.S. at 361 n.9.

<sup>1</sup> INT. REV. CODE OF 1954, § 501(c)(3) [hereinafter cited as CODE]. All citations are to the Internal Revenue Code of 1954 unless otherwise indicated.

<sup>2</sup> CODE § 501(c)(3) (emphasis added) exempts the following organizations from taxation:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, *no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation*, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

<sup>3</sup> 470 F.2d 849 (10th Cir. 1972), *cert. denied*, 414 U.S. 864 (1973).

This casenote will develop a rationale for the Tenth Circuit's unwillingness to apply the doctrine to the Internal Revenue Code.

First, the varied judicial interpretations of the proscription on influencing legislation prior to *Christian Echoes* will be examined. Then the Tenth Circuit's inclusion of grassroots lobbying within that statutory prohibition will be demonstrated. Finally, the historical origins of the unconstitutional conditions doctrine, which resulted from the now discredited right-privilege distinction, will be analyzed. It is hoped that this discussion will demonstrate that application of the unconstitutional conditions doctrine to the Internal Revenue Code would be inappropriate, due to the absence of a model income tax structure. The unconstitutional conditions doctrine is applicable only when a government privilege or benefit is present. But without a model tax structure to define what a tax benefit is in the first place, courts have no standards by which to determine when such a benefit has been revoked. Thus, attempts to constitutionalize the Internal Revenue Code by employing a doctrine premised upon the existence of government largess would be unsound and inexpedient.

## II. CHRISTIAN ECHOES' EXPANSIVE INTERPRETATION OF THE PROSCRIPTION ON INFLUENCING LEGISLATION

In 1953 Christian Echoes National Ministry, Inc., a non-profit religious corporation, qualified as a tax-exempt religious and educational organization within the meaning of § 101(6) of the 1939 Code.<sup>4</sup> In 1966, based on a review of Christian Echoes' activities during 1961-63, the Internal Revenue Service formally revoked the corporation's exempt status. After unsuccessfully protesting this revocation, Christian Echoes sued for a tax refund<sup>5</sup> in federal district court. There it was held that Christian Echoes qualified for the § 501(c)(3) exemption.<sup>6</sup> The Tenth Circuit reversed, holding that Christian Echoes was not tax-exempt because "[t]he activities of Christian Echoes in influencing or attempting to influence legislation were not incidental, but were substantial and continuous."<sup>7</sup> Thus the court concluded that the corporation was within the § 501(c)(3) exclusion from exemption.

The critical issue in the case was whether or not the § 501(c)(3) limitation on attempts to influence legislation should be broadly or narrowly interpreted. The district court had narrowly defined "legislation" to mean a specific bill before Congress.<sup>8</sup> The Tenth Circuit rejected the lower court's interpretation

<sup>4</sup> INT. REV. CODE OF 1939, § 101(6) (now INT. REV. CODE OF 1954, § 501(c)(3)).

<sup>5</sup> Although Christian Echoes sued only for a refund of F.I.C.A. taxes paid for 1961 and 1963-68, the decision affected its entire tax exempt status.

<sup>6</sup> Christian Echoes Nat'l Ministry v. United States, No. 67-C-114 (N.D. Okla., June 24, 1971). The government had appealed the decision of the District Court to the Supreme Court, contending the Supreme Court had jurisdiction under 28 U.S.C. § 1252 (1970) which allows a direct appeal to the Supreme Court from the decision "of any court of the United States . . . holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States . . . is a party." The Supreme Court vacated the judgment and remanded for the entry of a fresh decree, stating that the District Court had not held § 501(c)(3) unconstitutional. *United States v. Christian Echoes Nat'l Ministry, Inc.*, 404 U.S. 561 (1972). The government then appealed to the United States Court of Appeals for the Tenth Circuit.

<sup>7</sup> 470 F.2d at 856.

<sup>8</sup> *Christian Echoes Nat'l Ministry, Inc. v. United States*, No. 67-C-114 (N.D. Okla., June 24, 1971).

and construed "legislation" to include not only specific bills before Congress, but also current issues which the public might encourage Congress to consider. The court of appeals relied on a treasury regulation that defined legislation as "action by the Congress, by any State legislature, by any local council or similar governing body, or by the public in a referendum, initiative, constitutional amendment or similar procedure," and indicated that an organization attempts to influence legislation if it "contacts, or urges the public to contact, members of a legislative body for the purpose of proposing, supporting, or opposing legislation."<sup>9</sup> The court concluded that any attempts to influence the legislative process, either directly by urging the public to contact Congressmen concerning specific bills or current issues, or indirectly by simply attempting to influence the public (grassroots lobbying), would be attempting to influence legislation within the meaning of the statute. The court then listed twenty-two specific attempts by Christian Echoes to influence public opinion through grassroots lobbying:

For example, Christian Echoes appealed to its readers to: (1) write their Congressmen in order to influence the political decisions in Washington; (2) work in politics at the precinct level; (3) support the Becker Amendment by writing their Congressmen; (4) maintain the McCarran-Walter Immigration law; (5) contact their Congressmen in opposition to the increasing interference with freedom of speech in the United States; (6) purge the American press of its responsibility for grossly misleading its readers on vital issues; (7) inform their Congressmen that the House Committee on Un-American Activities must be retained; (8) oppose an Air Force Contract to disarm the United States; (9) dispel the mutual mistrust between North and South America; (10) demand a congressional investigation of the biased reporting of major television networks; (11) support the Dirksen Amendment; (12) demand that Congress limit foreign aid spending; (13) discourage support for the World Court; (14) support the Connally Reservation; (15) cut off diplomatic relations with communist countries; (16) reduce the federal payroll by discharging needless jobholders, stop waste of public funds and balance the budget; (17) stop federal aid to education, socialized medicine and public housing; (18) abolish the federal income tax; (19) end American diplomatic recognition of Russia; (21) outlaw the Communist Party in the United States; and (22) to restore our immigration laws.<sup>10</sup>

The court also listed eight specific instances of what it termed "attempts" to influence legislation through an indirect campaign to mold public opinion." These examples included activities relating to civil rights legislation, medicare, the Postage Revision Act of 1967, the Honest Election Law of 1967, the Nuclear Test Ban Treaty, the Panama Canal Treaty, firearms control legislation, and the Outer Space Treaty.<sup>11</sup>

To support its view that "legislation" included indirect campaigns to mold public opinion, the court relied upon *Cammarano v. United States*.<sup>12</sup> *Cammarano* consolidated the case of a Washington taxpayer who spent money to help defeat an initiative to place the retail sale of wine and beer into the hands of the

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<sup>9</sup> Treas. Reg. § 1.501(c)(3)-1(c)(3)(ii) (1959).

<sup>10</sup> 470 F.2d at 855.

<sup>11</sup> *Id.*

<sup>12</sup> 358 U.S. 498 (1959).

state and the case of an Arkansas taxpayer who expended funds to defeat a statewide prohibition initiative. Both taxpayers were in the business of selling liquor and deducted the sums spent under what is now § 162(a).<sup>13</sup> While *Cammarano* denied deductions for promoting legislation, the Tenth Circuit's reliance on that case is misplaced because of two important differences between the cases.

The first difference is that in *Cammarano* the taxpayers spent money to help defeat specific initiative measures that were before the voters. The treasury regulations in force at that time<sup>14</sup> contained a broad proscription against deducting "sums of money expended for lobbying purposes, the promotion or defeat of legislation, the exploitation of propaganda. . . ." Justice Harlan, in pointing out that these voter initiatives were plainly within the meaning of "legislation" under the regulations, observed that "[t]he Constitutions of the States of Washington and Arkansas both explicitly recognize that in providing for initiatives they are vesting legislative power in the people."<sup>15</sup> Thus, *Cammarano* holds that when the people have undertaken the legislative function through an initiative measure which if passed would become law, "attempting to influence legislation" includes direct appeals to the people. In *Christian Echoes*, however, the people were not in a position to exercise legislative power directly; the corporation was merely advocating its views to influence public opinion in general. Thus the *Christian Echoes* court expanded the proscription into the area of grassroots lobbying.

The second difference is that in declaring that the regulations in question had "acquired the force of law,"<sup>16</sup> the *Cammarano* Court relied upon the fact that the regulations were "an expression of a sharply defined national policy, further demonstration of which may be found in other sections of the Internal Revenue Code."<sup>17</sup> This national policy was that the Treasury must stand apart from all political agitation.<sup>18</sup> Doubts have been raised whether any such sharply defined policy existed when *Cammarano* was decided,<sup>19</sup> and since the enactment of § 162(e) in 1962,<sup>20</sup> it is even more doubtful that any such policy exists today.

There is no mention whatsoever of any policy of political and Treasury separa-

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<sup>13</sup> INT. REV. CODE OF 1939, § 23(a)(1)(A).

<sup>14</sup> Treas. Reg. 111, §§ 29.23(o)-1, 29.23(q)-1 (1943).

<sup>15</sup> *Cammarano v. United States*, 358 U.S. 498, 506 (1959) (emphasis added).

<sup>16</sup> *Id.* at 510.

<sup>17</sup> *Id.* at 508.

<sup>18</sup> *Id.* at 512.

<sup>19</sup> See Cooper, *The Tax Treatment of Business Grassroots Lobbying: Defining and Attaining the Public Policy Objectives*, 68 COLUM. L. REV. 801, 808-09 (1968); Note, *Deducting Business Expenses Designed to Influence Governmental Policy as "Ordinary and Necessary"*: *Cammarano v. United States and a Bit Beyond*, 69 YALE L. J. 1017, 1023-25 (1960).

<sup>20</sup> Section 162(e) was added to the Code by the Revenue Act of 1962 Pub. L. No. 87-834, § 3, 76 Stat. 960. Section 162(e) allows deductions for business expenses for direct communications with members of Congress or state legislatures concerning legislation. Some of the legislative history suggests that § 162(e) was a knowing reaction to *Cammarano* rather than an attempt to codify the status quo. 108 CONG. REC. 18492 (1962) (remarks of Senator Robert Kerr). In any event the passage of § 162(e) curtails the utility of the *Cammarano* holding in guiding current court decisions since *Cammarano* based its decision on a sharply defined policy of political and treasury separation which does not exist today.

tion in the legislative history of the § 501(c)(3) limitation on influencing legislation.<sup>21</sup> Indeed, when § 501(c)(3)'s predecessor was enacted, that provision was aimed only at the disallowance of deductions for donations intended to advance selfish economic interests of the donor.<sup>22</sup> However, the difficulties of articulating such a standard resulted in a broadly phrased statute that "went further than the committee intended to go."<sup>23</sup>

Other evidence also demonstrates that no such policy of Treasury and political separation exists today. For example, under § 501(c)(4),<sup>24</sup> organizations operated exclusively for the promotion of social welfare are exempt regardless of their attempts to influence legislation. Similarly, fraternal beneficiary societies, trade associations, and chambers of commerce are exempt under sections other than § 501(c)(3),<sup>25</sup> without reference to what effect their activities may have upon the political process.<sup>26</sup> Contributions to § 501(c)(3) organizations have more impact on the amount of revenue raised by the treasury than do contributions to some other exempt organizations, such as organizations exempt under § 501(c)(4), because the donor may deduct them under § 170(c)(3). However, contributions to veterans' organizations exempt under § 501(c)(19) and to fraternal beneficiary societies exempt under §§ 501(c)(8) and (10) are also deductible under §§ 170(c)(3) and (4). Since the latter organizations are not restricted in their political activity, the policy of Treasury and political separation articulated in *Cammarano* is apparently undercut by the allowance of either exempt status or deductible contributions to an organization engaged in political activity.

<sup>21</sup> See 78 CONG. REC. 5861 (1934).

<sup>22</sup> See statement of Mortimer M. Caplin at *Hearings on H.R. 13720 Before the House Committee on Ways and Means*, 92d Cong., 1st Sess. (1972), pp. 35-36; statement of George Cooper at 259-60; statement of Edwin S. Cohen at 17-20; Troyer, *Charities, Law-Making, and the Constitution: The Validity of the Restrictions on Influencing Legislation*, N.Y.U. 31ST INST. ON FED. TAX. 14-15, 1432-33 (1973) [hereinafter cited as Troyer].

<sup>23</sup> Senator Reed said:

There is no reason in the world why a contribution made to the National Economy League should be deductible as if it were a charitable contribution if it is a selfish one made to advance the personal interests of the giver of the money. That is what the committee were trying to reach; but we found great difficulty in phrasing the amendment. . . . I think we gave [the draftsmen] an impossible task; but this amendment goes much further than the committee intended to go.

78 CONG. REC. 5861 (1934).

<sup>24</sup> CODE, § 501(c)(4) exempts the following organizations from taxation:

Civic leagues or organizations not organized for profit but operated exclusively for the promotion of social welfare, or local associations of employees, the membership of which is limited to the employees of a designated person or persons in a particular municipality, and the net earnings of which are devoted exclusively to charitable, educational, or recreational purposes.

A social welfare organization may qualify under § 501(c)(4) even though it is an "action" organization described in paragraph (c)(3)(ii) or (iv) of Treas. Reg. § 1.501(c)(3)-1 if it otherwise qualifies under this section. Treas. Reg. § 1.501(c)(4)-1 (a)(2)(ii) (1959).

<sup>25</sup> CODE §§ 501(c)(19), 501(c)(8), 501(c)(10), 501(c)(5) and 501(c)(6).

<sup>26</sup> The following organizations are exempt under various sections of the Code: American Legion, Veterans of Foreign Wars, the Elks, the Moose, the Eagles, the Masons, the Shriners, the Knights of Columbus, AFL-CIO, United Auto Workers, American Farm Bureau, National Farmers Union, American Medical Association, National Chamber of Commerce, American Petroleum Institute, and the American Bankers Association. Troyer, *supra* note 22.

In short, *Cammarano* does not support the Tenth Circuit's expansive definition of "attempting to influence legislation" at the grassroots level when the public is not wielding legislative power. Nor does *Cammarano* provide valid policy reasons which can be the basis of a broad construction of "legislation" in *Christian Echoes*.

The Internal Revenue Code's restriction against carrying on propaganda or influencing legislation may have resulted from Judge Learned Hand's opinion in *Slee v. Commissioner*,<sup>27</sup> a Second Circuit decision affirming a Board of Tax Appeals (BTA) disallowance of deduction for contributions to the American Birth Control League. Although the proscription against influencing legislation was not then in the Internal Revenue Act,<sup>28</sup> the Second Circuit affirmed the BTA's determination that a purpose in the League's charter of enlisting the support of legislators "to effect the lawful repeal"<sup>29</sup> of existing laws prevented the League from being exclusively charitable.

Four years after the *Slee* decision, Congress enacted a provision denying tax exemptions to organizations that expended money for carrying on propaganda or otherwise attempting to influence legislation.<sup>30</sup> By this enactment Congress may have intended either (1) to enact explicitly the *Slee* holding that political agitation is outside the statute or (2) to make deductions more readily available than had *Slee* and other cases<sup>31</sup> by permitting insubstantial political activity and attempts to influence legislation. The Senate debates suggest that the latter construction is the correct one, and that the sponsors sought only to prohibit tax deductions for contributions that would fund political agitation to further the selfish interests of the donor.<sup>32</sup> Due to the difficulties of articulating such a standard, however, a broadly phrased statute was drafted, and the courts have varied in their interpretations of what activity is disallowed by the statute.

In the non-tax area charitable purposes have been defined as purposes the accomplishment of which is beneficial to the community.<sup>33</sup> United States courts have rejected the English view that a trust otherwise for a charitable purpose is not charitable if a change in existing laws is required to effectuate its purpose.<sup>34</sup> In the tax area, however, charitable purposes have been made inconsistent with political activity by § 501(c)(3)'s proscription against substantial activities at-

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<sup>27</sup> 42 F.2d 184 (2d Cir. 1930).

<sup>28</sup> Internal Revenue Act 1921, § 214(a)(11)(B); Revenue Acts 1924 and 1926, § 214(a)-(10), 26 U.S.C. § 955 (a)(10).

<sup>29</sup> 42 F.2d at 185.

<sup>30</sup> 40 Stat. 690, 700, 755, 760 (1934).

<sup>31</sup> See Note, *Political Activity and Tax Exempt Organizations Before and After the Tax Reform Act of 1969*, 38 GEO. WASH. L. REV. 1114, 1118 (1970).

<sup>32</sup> See, e.g., note 23 *supra*.

<sup>33</sup> 4 A. SCOTT, LAW OF TRUSTS § 368, at 2853 (3d ed. 1967).

<sup>34</sup> *Id.* § 374.4 at 2912:

Many reforms can be accomplished only by a change in the law, and there seems to be no good reason why the mere fact that they can be accomplished only through legislation should prevent them from being valid charitable purposes. The courts have upheld trusts for the improvement of the structure and methods of government, trusts for the prohibition of the manufacture and sale of liquor, trusts for various other objects, although in each case the accomplishment of the purposes of the trust involved a change in existing law.



tempting to influence legislation. In applying this restriction, courts have used two basic analyses in determining what kind of activities are "substantial": (1) a quantitative analysis in which the proportion of the organization's political activities in relation to its other activities must be less than substantial, and (2) a qualitative analysis in which the nature of the political activities is considered. Courts employing the quantitative analysis look to the amount of activity that constitutes legislative activity as the determining factor, ignoring whether public interests or private, selfish interests are served.<sup>35</sup> Courts employing the qualitative analysis of "attempting to influence legislation" seem to have added a judicial gloss to the proscription, interpreting it to mean "attempting to influence legislation for non-charitable purposes."<sup>36</sup> Accordingly, applications of the qualitative standard under § 501(c)(3) have permitted exemption of charities consistent with the common law of charities while applications of the quantitative standard restrict the common law even further.

The Tenth Circuit employed the quantitative approach in determining whether the activities of Christian Echoes were within the statutory proscription and relied on three cases in which the courts also used the quantitative approach. But the Tenth Circuit expanded the proscription beyond the interpretations in any of those cases into the area of grassroots lobbying and in so doing raised a constitutional question with respect to the § 501(c)(3) prohibitions on Christian Echoes' activities.

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<sup>35</sup> The quantitative approach is illustrated in *Kuper v. Commissioner*, 332 F.2d 562 (3d Cir. 1964) in which the Third Circuit found that a substantial part of the activities of the League of Women Voters of Millburn, New Jersey, consisted of attempts to influence legislation and *this fact alone* disqualified the taxpayer's donation from qualifying as a charitable contribution.

In *Seasongood v. Commissioner*, 227 F.2d 907 (6th Cir. 1955), the court based its holding on the fact that the amount of political activities of the Hamilton County Good Government League was not substantial when quantitatively compared with its other activities. Judge Simon, writing for the court, stated that in his view the word "propaganda" connoted "public address with selfish or ulterior purpose and characterized by the coloring or distortion of facts." He thus suggested that he would have reached the same result by using a qualitative standard. Judge Simon noted, however, that the other two members of the court did not agree with his qualitative definition of propaganda, and that they interpreted it as meaning any planned or concerted attempt to influence public opinion.

<sup>36</sup> In *Dulles v. Johnson*, 273 F.2d 362 (2d Cir. 1959), *rev'g* 155 F. Supp. 275 (S.D.N.Y. 1957), the Second Circuit reversed a district court holding that disallowed a deduction for federal estate tax purposes of bequests to city, county, and state bar associations on the ground that the bar associations existed primarily to benefit members of the legal profession and to provide a method to make their views and recommendations on legislation known to legislators. The Second Circuit found that the association's recommendations concerning impending legislation were "not such as to cause the forfeiture of charitable status" because they served no selfish purpose but were an effort to improve the law in technical and non-controversial areas. "*They [were] not intended for the economic aggrandizement of a particular group or to promote some larger principle of governmental policy.*" *Id.* at 367. In dictum the Eighth Circuit in *St. Louis Union Trust Co. v. United States*, 374 F.2d 427 (8th Cir. 1967), said that a bar association's efforts to improve the law and the administration of justice through research, investigation, drafting, recommendation and endorsement of various reforms constituted "public, not private, betterment" and was not "propaganda or disqualifying legislative activity." *Id.* at 436.

### III. APPLYING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE<sup>37</sup> TO THE INTERNAL REVENUE CODE

#### A. *Origins of the Doctrine*

The unconstitutional conditions doctrine has been used to circumvent the proposition that when the state can withhold a privilege or a benefit from an individual altogether, it also has the power to impose conditions upon the granting of the benefit. This proposition was articulated by Justice Holmes in *McAuliffe v. Mayor of New Bedford*<sup>38</sup> in which a policeman was removed from office for violating a regulation prohibiting policemen from soliciting money for political purposes. Justice Holmes tersely dismissed the policeman's argument that such a regulation violated his right to express his political opinions noting that "[t]he petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman."<sup>39</sup> He reasoned that since public employment was nothing but a privilege or a benefit which the state could withhold altogether, the state was also entitled to offer this privilege on condition.<sup>40</sup>

This flaw in Holmes' reasoning is found in his apparent presumption that the power to grant a benefit upon a condition is logically inferable from the power to withhold the benefit absolutely. He assumes that the limited power to grant the conditioned benefit is part of the greater power to withhold the benefit completely. However, the power to impose conditions upon the grant of a benefit is a *different power* from the power to deny a benefit, not a lesser power driven from it.<sup>41</sup>

*Doyle v. Continental Insurance Co.*<sup>42</sup> illustrates the kind of problems caused by the right-privilege distinction. In that case the Supreme Court allowed the state of Wisconsin, pursuant to a state statute, to revoke the license of a foreign corporation to do business in the state for removing a case to federal court. The Court said that a state may give a foreign corporation the option of ceasing to do business in the state or abstaining from the federal courts because the state may at any time disallow the corporation from doing business within its borders altogether. The dissent<sup>43</sup> argued that the majority's position was analogous to saying that because a landlord may refuse without cause to receive a

<sup>37</sup> See generally French, *Comment: Unconstitutional Conditions: An Analysis*, 50 GEO. L. J. 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935) [hereinafter cited as Hale]; O'Neil, *Unconstitutional Conditions: Welfare Benefits With Strings Attached*, 54 CALIF. L. REV. 443 (1966); Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960); Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) [hereinafter cited as Van Alstyne].

<sup>38</sup> 155 Mass. 216, 29 N.E. 517 (1892).

<sup>39</sup> *Id.* at 220, 29 N.E. at 517.

<sup>40</sup> Holmes used similar reasoning three years later in *Commonwealth v. Davis*, 162 Mass. 510, 39 N.E. 113 (1895), *aff'd*, 167 U.S. 43 (1897), to uphold the conviction of a preacher for presenting a public address on the Boston Commons in violation of a municipal ordinance prohibiting public address without a permit from the mayor.

<sup>41</sup> See Powell, *The Right to Work for the State*, 16 COLUM. L. REV. 99, 110-11 (1916).

<sup>42</sup> 94 U.S. 535 (1877).

<sup>43</sup> Justice Bradley authored the dissent and Justices Swayne and Miller concurred.

man as his tenant, he may also condition the tenancy on the applicant's murdering or robbing another.<sup>44</sup>

Attempts to articulate the doctrine underlying the unconstitutional conditions cases are difficult because of the inconsistency of the decisions and the changing focus of the Court. During the 1930's when the Court was concerned about preserving the values underlying the system of federalism, the focus was on the purpose underlying the condition. Recently, because of the Court's increased concern for the rights of individuals, the focus has been on whether the condition infringed upon an express constitutional right. It is this application which has had increasing appeal to commentators as a basis for holding § 501(c)(3) unconstitutional. *Christian Echoes* provides a vehicle for examining this doctrine as it would apply to the Internal Revenue Code.

B. *Application of the Unconstitutional Conditions Doctrine in the 1930's:  
Focus on the Federalism Value*

In the 1930's the Court was concerned with preserving the federalism value by insuring that federal regulations did not infringe upon powers reserved to the states. Thus, in *United States v. Butler*<sup>45</sup> the Court struck down the Agricultural Adjustment Act of 1933 because it attempted to infringe on powers reserved to the states by regulating agriculture through the use of federal funds. In his dissent, Justice Stone<sup>46</sup> argued that the power to spend for the general welfare was authorized and that the conditions attached to the payments were germane to the purpose of spending for the farmer's welfare:

It is a contradiction in terms to say that there is power to spend for the national welfare, while rejecting any power to impose conditions reasonably adapted to the attainment of the end which alone would justify the expenditure. . . . If the expenditure is for a national public purpose, that purpose will not be thwarted because payment is on condition which will advance that purpose.<sup>47</sup>

In another case<sup>48</sup> sustaining a federal tax on the payroll of employers under Title IX of the Social Security Act, which provided for a 90% credit for contributions paid under state unemployment compensation laws, Justice Cardozo said:

We do not say that a tax is valid, when imposed by act of Congress, if it is laid upon the condition that a state may escape its operation through the adoption of a statute unrelated in subject matter to activities fairly within the scope of national policy and power. . . . It is one thing to impose a tax dependent upon the conduct of the taxpayers, or of the state in which they live, where the conduct to be stimulated or discouraged is unrelated to the fiscal need subserved by the tax in its normal operation, or any other end legitimately national. . . . It is quite another thing to say that a tax will be abated upon the doing of an act that will

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<sup>44</sup> *Doyle* was overruled in *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922). The court said that conditions attempting to curtail the constitutional right of citizens of one state to resort to federal courts in another are void.

<sup>45</sup> 297 U.S. 1 (1936).

<sup>46</sup> Justices Brandeis and Cardozo concurred in the dissent.

<sup>47</sup> 297 U.S. at 85-86.

<sup>48</sup> *Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

satisfy the fiscal need, the tax and the alternative being approximate equivalents.<sup>49</sup>

Professor Hale, writing in 1935, said that despite the broad language the Supreme Court has used in describing the unconstitutional conditions doctrine,<sup>50</sup> the exercise of a governmental power is not necessarily unconstitutional just because its purpose is to induce the waiver of constitutional rights. Rather, the validity of a state's exercise of power depends upon the purposes for which it is exercised and a power may be valid when exercised for certain purposes and invalid when exercised for others.<sup>51</sup> Thus when the condition imposed on an individual is germane to a purpose for which the exercise of the state's particular power can ordinarily be exerted, then the condition may require the waiver of the individual's constitutional rights.

C. *Recent Applications of the Unconstitutional Conditions Doctrine:*  
*Focus on Infringement of Express Constitutional Rights*

The cases arising since the 1930's that have involved the unconstitutional conditions doctrine have dealt primarily with conditions requiring the surrender of constitutional rights attached to governmental privileges. For example, in *Sherbert v. Verner*<sup>52</sup> the Court held that a state may not disqualify an applicant for unemployment compensation benefits because of her refusal to accept Saturday employment against her religious beliefs. Speaking for the court, Justice Brennan said:

Nor may . . . the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.<sup>53</sup>

When the enjoyment of a government-connected interest is conditioned upon the individual's abstention from the exercise of a right protected by an express clause in the Constitution, the condition will be declared per se unreasonable if it can be shown to prohibit or abridge the individual's exercise of that right.<sup>54</sup> Professor Van Alstyne finds this doctrine judicially attractive because it not only preserves the appearance of judicial objectivity by not requiring balancing tests, but also expedites decision-making by allowing the court to resolve a single question, whether or not the regulation conditioned the individual's privilege upon his waiver of an express constitutional right.<sup>55</sup>

This attractive simplicity may, however, illustrate the flaw in the doctrine: the doctrine assumes "the same evil results from attaching certain conditions to government-connected activity as from imposing such conditions on persons not

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<sup>49</sup> *Id.* at 590-91.

<sup>50</sup> *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926).

<sup>51</sup> Hale, *supra* note 37, at 322.

<sup>52</sup> 374 U.S. 398 (1963).

<sup>53</sup> *Id.* at 404-05.

<sup>54</sup> Van Alstyne, *supra* note 37, at 1446.

<sup>55</sup> *Id.* at 1446-48.

connected with the government."<sup>56</sup> The connection with the government may make otherwise unreasonable conditions reasonable in certain circumstances. Because the unconstitutional conditions doctrine attaches no significance to status in the public sector, it may be too simplistic and inflexible to deal with such problems.<sup>57</sup>

It has been suggested that under Van Alstyne's view of the unconstitutional conditions doctrine, § 501(c)(3) is unconstitutional,<sup>58</sup> since it conditions the privilege of tax exemption on the waiver of protected first amendment rights of freedom of speech.<sup>59</sup> By denying an exemption under § 501(c)(3) to organizations engaging in speech designed to influence the political system, Congress has effectively penalized these organizations for such speech.<sup>60</sup> The expansive definition of activity which "attempts to influence legislation" in *Christian Echoes* conditions a governmental privilege on the waiver of the right to expression of political views which are designed to influence other individuals as well as the legislature, and appears to be a clear violation of Van Alstyne's view of the unconstitutional conditions doctrine. But by comparing its decision upholding the constitutionality of § 501(c)(3) to the decision in the Hatch Act case,<sup>61</sup> the Tenth Circuit implicitly suggested that either the unconstitutional conditions doctrine is more complex than Van Alstyne understands it to be or the unconstitutional conditions doctrine has limited applicability within the Internal Revenue Code.

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<sup>56</sup> *Id.* at 1448.

<sup>57</sup> For example, under Van Alstyne's view of the doctrine the decision in *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947), which upheld the constitutionality of the Hatch Act was incorrect. Yet the Supreme Court's recent decisions in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), and *United States Civil Serv. Comm'n v. National Assn. of Letter Carriers*, 413 U.S. 548 (1973), which reaffirm the constitutionality of the Hatch Act and the state's power to regulate the political activity of its employees, suggest that (1) either the doctrine has limited applicability in certain circumstances which as public employment or (2) the doctrine as developed by Van Alstyne is oversimplified. See Van Alstyne, *supra* note 37, at 1447, 1448 in which Van Alstyne discusses the inflexibility of the doctrine.

<sup>58</sup> See Troyer, *supra* note 22, at 1429, 1450; *The Internal Revenue Code's Provisions Against Legislative Activity on the Part of Tax-Exempt Organizations: A Legitimate Safeguard or a Violation of the First Amendment?*, 3 N.Y.U. REV. OF LAW SOC. CHANGE 159, 175-76 (1973).

<sup>59</sup> The central purpose of the first amendment is to protect expression which can influence the American political system and produce orderly change through self government. It was "fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people," *Roth v. United States*, 354 U.S. 476, 484 (1957), and thus it protects all discussion and communication concerning issues of public concern. Cf. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971); Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

<sup>60</sup> *Speiser v. Randall*, 357 U.S. 513, 518 (1958).

<sup>61</sup> 470 F.2d at 857. In *United Public Workers v. Mitchell*, 330 U.S. 75 (1947) the Court upheld the validity of the Hatch Act restrictions on the political activities of government employees against a claim that the statute unconstitutionally conditioned the status of public employment on the waiver of first amendment constitutional rights.

#### IV. DESIRABILITY OF APPLYING THE UNCONSTITUTIONAL CONDITIONS DOCTRINE TO THE INTERNAL REVENUE CODE

Applying the unconstitutional conditions doctrine to § 501(c)(3) would be, it is submitted, an impossible task without an ideal or correct income tax structure.<sup>62</sup> This may account for the Tenth Circuit's reliance on the Hatch Act case in *Christian Echoes*,<sup>63</sup> suggesting the limited applicability of the unconstitutional conditions doctrine within the Internal Revenue Code, although the court itself did not fully explain its reasons for upholding the constitutionality of § 501(c)(3). Two underlying assumptions of the unconstitutional conditions doctrine are that a government privilege or government largess exists and that it is unconstitutionally conditioned on the waiver of express constitutional rights.<sup>64</sup> The "privilege" under § 501(c)(3) has been characterized as a tax exemption<sup>65</sup>; but it is impossible to characterize income tax provisions as "benefits" without a model tax structure from which deviations are clearly identifiable.

The difficulty with applying the unconstitutional conditions doctrine in the area of income taxation is the absence of concurrence on the definition of the word "income." No theoretical agreement exists today on either of two definitions basic to a model income tax structure: (1) what items should be taxed, and (2) what subjects are appropriate taxable units. Leading tax scholars cannot agree whether selecting a tax model for such items is possible;<sup>66</sup> nor can scholars who advocate such a model agree on the basic definitions.<sup>67</sup> Congress has not attempted to adopt a model tax structure to guide its tax decision-making. Without any basic agreement at the legislative level the courts have no standards by which to determine whether government largess has been bestowed or a condition imposed.

Obviously, there is no way for a legislature to tax *everything*. Even the greediest legislature must choose the appropriate objects of taxation from the universe of people, entities, and events over which it has jurisdiction.<sup>68</sup> The term "income tax" is misleading because the name does not delineate the extent of the tax's reach as, for example, the label "poll tax"<sup>69</sup> depicts the base to which the tax is to be applied.<sup>70</sup> Provisions excluding children, veterans, and the handicapped from the poll tax could be accurately characterized as government benefits or privileges. Since Congress has not provided the courts with a model tax structure from which deviations can be identified, applying the unconstitutional

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<sup>62</sup> Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244 (1969); Bittker & Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 YALE L. J. 51 (1972).

<sup>63</sup> *Christian Echoes Nat'l Min., Inc. v. United States*, 470 F.2d 849, 857 (10th Cir. 1970).

<sup>64</sup> Van Alstyne, *supra* note 43, at 1446.

<sup>65</sup> Troyer, *supra* note 22, at 1427.

<sup>66</sup> B. BITTKER, C. GALVIN, R. MUSGRAVE, J. PECHMAN, *A COMPREHENSIVE INCOME TAX BASE? A DEBATE* (1968) [hereinafter *DEBATE*].

<sup>67</sup> *Id.* at 3-9.

<sup>68</sup> Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285, 1288 (1969).

<sup>69</sup> Capitation or poll taxes (poll meaning "head") are taxes of a fixed amount upon all persons resident within a specified territory. *Shattiesburg Grocery Co. v. Robertson*, 88 So. 4, 5, 126 Miss. 34 (1921); *United States v. Texas*, 252 F. Supp. 234, 238 (W.D. Tex. 1966).

<sup>70</sup> *DEBATE*, at 67.

conditions doctrine in the Code would result in arbitrary, disparate decision-making.<sup>71</sup>

For example, a hypothetical model tax structure with which § 501(c)(3) is in perfect accord can be developed to illustrate that § 501(c)(3) does not reflect government largess. The model taxes the income of natural persons only; the income of business organizations, trusts, et cetera, is imputed to their shareholders, beneficiaries, or other interested natural persons. Under this model the income of some groups—chambers of commerce, social clubs, labor unions, and charities engaged in political activity—might be imputed to their members on the basis that they enjoy the economic benefit of the entity's income. Other groups like the Red Cross might have beneficiaries too widespread to impute with the organization's income and still be in accord with the assumed function of income taxation—collecting revenue from natural persons proportionately to their economic gain.<sup>72</sup> Thus determinations of what constitutes a benefit gauged against the model structure would lead to the conclusion that § 501(c)(3) includes neither government largess or a condition.

#### V. CONCLUSION

The current income tax structure is a compendium of many provisions reflecting many debatable judgments. Like all legislative judgments, tax policy decisions may be unwise and improvident. When they appear unwise to taxpayers and to courts, however, they should not be eliminated from the Code by applying a constitutional doctrine based on the premise of a government privilege, since there are no standards for determining what is and is not a tax privilege. In *Christian Echoes* the Tenth Circuit made the only tenable decision when faced with the problem of whether to apply the unconstitutional conditions doctrine to the Internal Revenue Code; constitutional distinctions resting on the supposition of government largess cannot be based on an undefined concept of the "income tax."

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<sup>71</sup> It could, of course, be argued that whatever provisions Congress enacts become the model tax structure per se. If this is true, however, there are still no tax privileges since definitionally the base is composed of only those items Congress chooses to tax.

<sup>72</sup> Bittker, *Churches, Taxes, and the Constitution*, 78 YALE L.J. 1285, 1289-90 (1969). Of course, provision may need to be made to deal with associated problems—e.g., unrelated business income.